No. 16013.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

[illegible] PACKARD, INC.,

Appellant,

vs.

[illegible] MOTORS CORPORATION, a corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

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ABC PACKARD, INC.,

Appellant,

vs.

GENERAL MOTORS CORPORATION, a corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

Statement of Jurisdiction.

In this case Appellant seeks to obtain the reversal of an adverse judgment rendered in a civil action wherein ABC Packard, Inc., a corporation, sought damages for fraud against General Motors Corporation, a corporation.[1]

The jurisdiction of the Court of Appeals is believed to derive from Title 28, United States Code, Section 1291,

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[1]The parties to the appeal will be designated as follows: ABC Packard, Inc., and Anderson Buick Company (the latter being the original corporate name prior to amendment of the Appellant) and M. O. Anderson, its President, principal stockholder and predecessor in interest as "Anderson"; General Motors Corporation as "General Motors"; Buick Motor Division of General Motors Corporation as "Buick."

The Transcript of Record will be indicated by the legend "Tr." followed by appropriate volume and page references; references to portions of the depositions of Harlow H. Curtice, William F. Hufstader, George H. Ruhe and Henry Bauer, read into evidence at the trial, will be indicated by the name of the deponent, followed by the legend "Dep." and appropriate page and line references.

the within appeal being taken from a final decision of the United States District Court for the Western District of Washington, Northern Division.

The jurisdiction of the United States District Court was derived from Title 28, United States Code, Section 1331, in that there is diversity of citizenship, and the amount involved, exclusive of interest and costs, exceeds the sum of Three thousand ($3,000) Dollars.[2]

The Complaint [Tr. Vol. I, pp. 3-38] was filed June 30, 1955, and the jurisdictional allegations appear in paragraph II thereof [Tr. Vol. I, p. 6]. The case was tried on an Amended Complaint filed August 12, 1957 [Tr. Vol. II, pp. 396-407] and the jurisdictional allegations appear in paragraph II thereof [Tr. Vol. II, pp. 397-398]. The original Answer [Tr. Vol. I, pp. 39-102] was filed July 25, 1955, and the Answer to the Amended Complaint [Tr. Vol. II, pp. 408-412] was filed August 19, 1957. Paragraph II of the Answer to the Amended Complaint admitted the jurisdictional allegations [Tr. Vol. II, p. 409].

Judgment for defendants upon a jury verdict was entered on January 7, 1958 [Tr. Vol. II, pp. 500-503] and Notice of Appeal filed February 5, 1958 [Tr. Vol. II, p. 528].

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[2]The case arose and was tried prior to the recent amendment to the Judicial Code, increasing the jurisdictional requirement to $10,000, exclusive of interest and costs. Nonetheless, as appears from the pleadings, the new requirements are satisfied by the action.

Statement of the Case.

The questions involved in this appeal, and the manner in which they are raised, are as follows:

Preliminary.

This is an action by Anderson, a former distributor of Buick automobiles, against General Motors, for damages arising from a fraud resulting in the termination by General Motors of the Anderson distributorship. The claim of fraud proceeds on two theories, either of which would be sufficient to sustain recovery: first, the non-disclosure by General Motors of General Motors' secret policy to terminate the Anderson distributorship when it became more profitable for General Motors to distribute Buick automobiles itself; secondly, misrepresentations made to Anderson by General Motors to the effect that the Anderson distributorship would not be terminated so long as its performance was satisfactory [Tr. Vol. II, pp. 396-407].[3]

We wish to note at the outset that this is not an appeal on the facts. As more fully appears from the Specification of Errors (this brief, pp. 38-41) only questions of law are presented to the Court. It is the position of Appellant that the relationship of the parties gave rise, in law, to a mutual duty to deal fairly, including a duty imposed by law upon General Motors to disclose to Anderson its secret policy of terminating distributorships. Appellant contends that the trial court erred in submitting to the jury the question of the existence of the duty to disclose. This point was raised

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[3]The quality of Anderson's performance was not in issue at the trial, General Motors having conceded in open court that performance was satisfactory [Tr. Vol. II, pp. 652-653].

in the trial court and an exception specifically saved [Tr. Vol. VI, p. 2243].

To place Appellant's Specification of Errors in its proper context, some factual review is necessary. We propose to rely primarily upon uncontroverted facts, which we believe will demonstrate an extremely close and dependent relationship in which General Motors played a dominant part *vis-a-vis Anderson,* and conversely, the part of Anderson *vis-a-vis* General Motors was one of complete subservience. This relationship can be shown, we believe, through the testimony of General Motors' own officers and employees.

Commencement of the Anderson Distributorship.

Anderson, theretofore a regional manager of Motors Holding Division of General Motors, commenced operations as the distributor of Buick automobiles in the Seattle area in 1936 at the suggestion of William F. Hufstader, then General Sales Manager of Buick [Tr. Vol. V, pp. 1854-1856]. He had not sought the distributorship. Prior to accepting it, he consulted at some length with Mr. Dean, then President of Motors Holding Division, who told him that he viewed the opportunity as a good one and that Anderson need not concern himself about tenure so long as he did a proper job [Tr. Vol. III, pp. 834-837; Tr. Vol. V, pp. 1854-1856].

General Motors' Control of Anderson Policies.

At no time was Anderson permitted to make major policy decisions with respect to the distributorship without consultation and approval of his General Motors' superiors.

The Distributor Selling Agreement provided (Sec. 12):

> "Distributor will maintain a place of business including salesroom, service station, parts and accessories

facilities, and used car facilities satisfactory to Seller and will maintain the business hours customary in the trade. Distributor will permit Seller to inspect said place of business at all reasonable times in business hours.

"Distributor will not move to or establish a new location, branch sales office, branch service station or place of businesss including any used car lot or location without the prior consent of Seller." [Tr. Vol. I, p. 70.]

Accordingly, whenever it appeared that new facilities should be acquired for the distributorship or that existing facilities should be disposed of, Anderson was required to obtain the advice and approval of responsible General Motors' officials.

Anderson testified that with one exception he did obtain the advice and approval of responsible General Motors' officials, as required by the agreement, before acquiring or disposing of any facilities [Tr. Vol. III, p. 867, 868, 955, 956, 1133, 1134].

At the outset in 1936, Anderson consulted Hufstader regarding a location for the distributorship and did not act upon it until Hufstader indicated his approval [Tr. Vol. V, pp. 1857-1859]. In 1946, Anderson cleared with Hufstader plans for improving Anderson's parts facilities [Tr. Vol. III, pp. 884-885]. The acquisition of the buildings numbered 2 and 3 and of a used car facility were likewise cleared with responsible General Motors' officials, and in each instance General Motors' approval was necessary before Anderson undertook action [Tr. Vol. III, p. 952, pp. 1133-1134; Vol. IV, p. 1366]. In the one instance where Anderson expanded facilities without prior approval he was severely censured and was not permitted to use

such facilities until the approval of Albert H. Belfie, Buick General Sales Manager, was obtained [Tr. Vol. V, p. 2022; Tr. Vol. VI, 2052].

The requirement of consultation with General Motors was not confined to the acquisition and improvement of facilities for the distributorship.

Thus, in 1950, when a highly profitable sale of the main facilities for approximately $850,000 was under consideration, the advice of Mr. Nash, Buick Regional Manager, was sought, and it was made clear to the agent who was to handle the sale of the property that there could be no sale without prior factory approval. Mr. Nash suggested that there should be no sale, and there was none [Tr. Vol. III, pp. 959-962; Vol. V, pp. 1723-1726].

Again, in February, 1951, Mr. Belfie advised against a promotional program then under consideration for the distributorship [Tr. Vol. VI, p. 2093].

In short, no major venture could be undertaken by Anderson without the advice and consent of General Motors. The reasons for this are not difficult to find.

Apart from the personal relationship between M. O. Anderson and his superiors in the Buick organization, it is quite clear from an examination of the General Motors *modus operandi* that General Motors had and exercised virtual control of the Anderson operations. In order to understand the quality and nature of the control, a consideration of the organizational hierarchy or "chain of command" in General Motors, and for present purposes in Buick, is in order.

The Buick "Chain of Command."

The General Motors organization is pyramidal in structure. At the apex is the top corporate command headed from 1952 until recently by Harlow H. Curtice. Subordinate to the top corporate command was the divisional hierarchy. The present case concerns itself with the Buick divisional organization.

At the apex of Buick is its General Manager, a position occupied by Mr. Curtice from 1933 until 1948, and later by Mr. Ivan L. Wiles. Functioning under the General Manager is a General Sales Department, headed by a General Sales Manager. Mr. Hufstader was General Sales Manager from 1933 until 1948, and Mr. Belfie occupied that position at the time of the termination of the Anderson distributorship. Subordinate to the General Sales Manager, in descending order of authority, were assistant general sales managers, regional managers and zone managers or distributors, the latter occupying a position analogous to zone managers, notwithstanding their private ownership. Each zone manager or distributor had a group of dealers in his territory [Curtice Dep. pp. 129-133; Hufstader Dep. pp. 339-341, 343-344].

Anderson as Distributor-Zone Manager.

Anderson, as a Buick distributor, occupied a position analogous to that of a zone manager, working with dealers, obtaining regular reports from them which in turn were forwarded to General Motors, and overseeing the

activities of the dealers in order to assure that they carried out the policies formulated by General Motors.[4]

His functions as a distributor in this regard did not differ materially from those he had occupied for a term prior to undertaking the distributorship [Tr. Vol. III, pp. 828-829, 839-840, 843; Curtice Dep. pp. 232-233; Ruhe Dep. p. 14]. Thus, where dealers functioning under a distributor performed poorly, the distributor would take action just as was the case with zone managers employed directly by Buick in areas where distributors did not operate [Curtice Dep. pp. 232-233; Rude Dep. p. 14, line 15, to p. 17, line 5].

Like a zone manager, Anderson's immediate superior was the regional manager. During most of the period material to the present case, this position was occupied by Mr. Nash, a long term friend and associate of Anderson [Tr. Vol. III, pp. 828, 853-854].

General Motors' Control of Anderson.

Through the foregoing chain of command, Buick completely dominated the activities of Anderson. Such domination was effected through the following means:

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[4]The Distributor Selling Agreement provided (Sec. 25):

"A. Appointment

Distributor, after review with Seller, will enter into selling agreements with dealers for the sale of new Buick motor vehicles, chassis, parts and accessories under the jurisdiction of Distributor at such places within the area described in Paragraph First as Distributor shall deem advisable or as Seller may require.

"B. Failure to Appoint

If Distributor fails or neglects to appoint dealers upon request of Seller within three (3) months after such request, Seller shall have the right to appoint dealers at the places designated." [Tr. Vol. I, pp. 82-83.]

A. Inspections.

The Distributor Selling Agreement required Anderson to permit General Motors to inspect facilities.[5] Frequent inspections were in fact made.

Mr. Hufstader, as General Sales Manager, inspected the Anderson facilities from time to time [Tr. Vol. V, p. 1862]. In 1948 both Messrs. Hufstader and Curtice inspected the premises [Tr. Vol. V, p. 1872].

Mr. Nash called on the Anderson distributorship approximately every 60 days, inspecting every phase of the operation, interviewing the various department heads so as to obtain an overall picture as to what they were doing, and making "as complete contact as possible with the business." The information thus obtained was passed upward through the Buick chain of command which took such action as the circumstances appeared to warrant. At the same time Mr. Nash passed on to Anderson information received from his superiors, relating to such matters as Anderson's capital requirements, the adequacy of Anderson's facilities, advertising programs and market penetration. It was Nash's duty to discuss with Anderson any deficiencies which might appear. Thus, where certain items of expense appeared to be excessive, Nash would discuss them with Anderson and recommend their elimination [Tr. Vol. V, pp. 1988-1991, 2045-2047; Vol. VI,

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[5]Paragraph 21J of the Distributor Selling Agreement provides:

"J. Inspection of Facilities

Distributor will permit Seller to inspect and check over Distributor's service facilities and stock of parts and accessories at any reasonable time in business hours." [Tr. Vol. I, p. 77.]

pp. 2129-2130; Hufstader Dep. pp. 396-399]. In short, Nash and indeed the Buick organization in general were constantly engaged in advising Anderson as to the general conduct of the distributorship.[6]

B. Meetings.

Another control device employed by General Motors was the use of meetings in which Anderson was advised by General Motors officials as to the manner in which its operations were to be conducted. At times, such meetings were held locally, at other times distributors were summoned to the Home Office of Buick at Flint, Michigan [Curtice Dep. p. 81; Hufstader Dep. pp. 344-346]. Typical of such meetings was one held in March, 1948, at Seattle, at which Messrs. Curtice and Hufstader spoke to the Anderson organization on the subject of Buick's plans and policies [Hufstader Dep. pp. 532-533].

Through such meetings, as well as by individual contacts through Nash and others, General Motors purported to keep Anderson informed of policies insofar as they affected the operations of the distributor [Curtice Dep. pp. 224-230, 236-237]. They did not, however, inform Anderson of the policy most basic to the distributorship, to wit, the long standing secret policy which ultimately resulted in its termination.

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[6]General Motors maintained a Business Management Department which promulgated policy, and a Sales Department which promulgated policy as to sales promotion and advertising. Supervision and control was carried to the extent that General Motors maintained a special department to prepare plans for physical facilities for distributors and dealers [Curtice Dep. pp. 220-222, 224-230].

C. Reports.

Another control device employed by General Motors was its insistence upon the furnishing by Anderson of numerous periodic reports setting forth every conceivable detail of operation.

General Motors controlled the inventory of the distributorship by requiring ten-day reports from Anderson as to his own operations and those of his dealers, reporting inventories of new and used cars, deliveries and unfilled orders.[7]

The information thus received was compiled and used to determine future car allotments and as the basis of standing sheets which rated the various zones in terms of their relative turn-over, as a measuring stick of performance[8]

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[7]This information was likewise obtained, or verified, by inspection trips of Buick officials. For example, in early 1952 Mr. Ruhe, then regional sales manager, made frequent trips to Seattle, at which time he would consult with Howard Anderson as to his reports and statements. Howard Anderson testified that he felt there were no secrets, and discussed personnel, salaries, wages, and answered all questions put by Ruhe [Tr. Vol. IV, pp. 1382-1383; Ruhe Dep. p. 27, lines 12-13; p. 70, lines 9-15; p. 70, line 22, to p. 71, line 1].

[8]The Distributor Selling Agreement provides:

"2. Handling of Distributor's Orders

"A. Three Months' Estimate of Requirements

"Distributor will, unless otherwise advised by Seller, furnish Seller for its general guidance every month, on the date specified by Seller, an estimate, on forms provided by Seller, of his requirements of new Buick motor vehicles and chassis for the three (3) calendar months next following, each month's estimate to be shown separately.

"B. Ten Day Report

"In order to permit Seller to keep its purchases of raw materials and the production and distribution of Buick motor vehicles and chassis in line with retail sales, Distributor will furnish Seller, every ten (10) days, with a report known as the 'Ten-day Report' on standard forms supplied by Seller. Such report shall show retail sales of both new and used cars made during said period, new and used car stocks, and unfilled orders on hand at the end of said period." [Tr. Vol. I, pp. 55-56.]

[Hufstader Dep. pp. 366-367, 370-371; Curtice Dep. pp. 224-230].

Anderson was required to furnish General Motors with monthly financial statements, sales reports, reports as to the financial condition and physical facilities of the various dealers under his jurisdiction, reports as to his own physical facilities, reports as to enlargement of facilities, and reports dealing with the operation of Anderson's service department, among others.[9] Likewise, a monthly report was made dealing with the subject of "open points" (*i.e.*, unfilled dealerships) in Anderson's territory.

Each of these reports was submitted on forms prepared by Buick, the information being channeled to the Buick office at Flint either directly or through the Buick chain of command which we have heretofore outlined [Tr. Vol. III, pp. 840-844, 876-879, 999, 1001-1003; Hufstader Dep. pp. 378-381, 474-475].

The information received from such reports, as well as that from other sources (such as car registrations) was used by Buick in various surveys and analyses of the operations of its dealers and distributors [Hufstader Dep. pp. 373-375].

Thus, Buick made market penetration and price class analyses of the operations of its dealers and distributors on a national basis. Where performance fell below national average, this fact was forcibly brought to the attention of the erring zone manager or distributor [Curtice Dep. pp.

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[9]The Distributorship Agreement provided (Section 18):

"In furtherance of the purposes, objective, and obligations provided for in this Agreement, Distributor will keep complete and up-to-date records regarding the sale and servicing of new Buick motor vehicles and chassis and will permit Seller at all reasonable times in business hours to inspect such records." [Tr. Vol. I, p. 73.]

230-231, 232-233; Hufstader Dep. pp. 350, 352, 373-374]. In the words of Mr. Hufstader, where, as a result of statistical compilations, it appeared that a particular zone was below average, "an effort would be made to find out where the weakness existed, and then, as I have expressed it many times, lean up against that weakness." The "leaning" function was the responsibility of the person immediately superior to the one whose operations had fallen below the norm; in the case of a dealer, this would be the distributor; in the case of a distributor, the regional manager [Hufstader Dep. pp. 354-355].

Again, the financial statements received from dealers and distributors were composited and studied by the upper echelon of Buick to determine whether the particular business operation was satisfactory to Buick in general [Curtice Dep. pp. 88, 90]. Special studies were made from time to time. The information received was in such form that Hufstader, as General Sales Manager of Buick, could determine from a mere inspection of them any change in the business operations of a distributor, whether it related to profits, physical facilities, assets or any other item [Hufstader Dep. p. 376]. It can be assumed that where such changes displeased him, his displeasure was conveyed to the party responsible for it, and further "leaning" ensued.

In order to facilitate such analyses, Anderson, along with other General Motors distributors and dealers, was required to use a standardized accounting system devised by General Motors[10] [Tr. Vol. III, p. 1083; Tr. Vol. IV, pp. 1442, 1457-1459; Curtice Dep. pp. 223-224].

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[10]The Distributor Selling Agreement provided (Section 15A): ". . . Distributor will use and keep up to date at all times a satisfactory uniform accounting system designated by Seller and will furnish to Seller, by the tenth of each month, a com-

In short, General Motors required Anderson to furnish it with a mass of information which was composited and carefully analyzed in order to determine whether Anderson was satisfactorily carrying out General Motors' policies. Whenever any deviation from the norm established by General Motors was observed on the part of Anderson or any other dealer or distributor, the offending party would be warned to get in step.

D. General Motors' Zone Manual.

Still another control device employed by General Motors was its "zone manual," which contained various requirements with regard to operational forms and processes, unilaterally devised by General Motors, with which Anderson and other distributors were required to comply. If they ignored the suggestions in the manual, the matter would be called to their attention by Buick's field personnel, the degree of censure depending upon the area of non-conformity [Hufstader Dep. p. 387].

E. Illustrations of General Motors' Control of Anderson.

Perhaps the best illustration of the use of these highly effective control devices is General Motors' constant pressure on Anderson to increase his working capital. Parenthetically, it should be noted that throughout Anderson's distributorship he considered his working capital sufficient for his own needs [Tr. Vol. V, pp. 1947-1948]. This is ordi-

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plete and accurate financial and operating statement with supporting data covering the preceding month's operations, showing the true and actual condition of Distributor's business. Distributor will maintain said system in strict accordance with the Accounting Manual prescribed by Seller." [Tr. Vol. I, p. 72.]

narily the privilege of an independent businessman. Moreover, Anderson never failed to pay prior to delivery for any automobiles which Buick supplied him; in fact, Anderson sought to obtain more automobiles than Buick was willing to supply [Tr. Vol. V, pp. 1947-1948].

Nevertheless, General Motors determined, unilaterally, that Anderson's working capital should be increased in accordance with a nationwide program established by General Motors in 1945 [Tr. Vol. V, p. 1944], and they so advised Anderson [Tr. Vol. III, pp. 913-914, 916-917; Vol. IV, pp. 1364-1365]. Although Anderson replied that he felt his capital structure was reasonably sound [Tr. Vol. V, pp. 1865-1866] Hufstader and his subordinates insisted that Anderson increase his working capital up to the level established for Anderson by General Motors[11] [Tr. Vol. III, pp. 894, 906-907]. Constant pressure was exerted on Anderson by written communications and personal contact [Tr. Vol. III, pp. 894, 906-910, 927-932, 964-965; Vol. V, pp. 1863-1864, 1938; Hufstader Dep. pp. 505-506], and finally Anderson was forced to borrow $500,000 from a lending agency, secured by a mortgage on the Anderson properties, in order to obtain the cash position which Gen-

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[11]The written Distributorship Agreement between Anderson and General Motors provided (Section 14):

> ". . . since Seller has set standards for distributor capital and net worth based on Seller's past experience, Distributor shall establish his own net working capital and net worth in the respective amount and form specified by Seller. If the amount of owned net working capital or net worth or the way in which either is set up is now or hereafter inadequate in Seller's estimation for the proper handling of Distributor's business, Distributor will take the necessary steps to meet Seller's applicable requirements within the time determined by Seller." [Tr. Vol. I, p. 71.]

eral Motors had ordained for him[12] [Tr. Vol. III, pp. 1017-1028; Tr. Vol. IV, pp. 1378-1382; Tr. Vol. V, p. 1799].

Another illustration of General Motors' control of Anderson's policies is found in General Motors' insistence that Anderson provide what General Motors regarded as adequate facilities [Curtice Dep. pp. 76-77]—a requirement which General Motors policed through personal inspection and written reports[13] [Curtice Dep. pp. 89-90; Hufstader Dep. pp. 325-326, 378-379, 474-475; Tr. Vol. III, pp. 1001-1003]. In line with this policy, Anderson, along with other dealers and distributors, was constantly urged to expand his sales and service facilities [Tr. Vol. V, pp. 2047-2048; Hufstader Dep. pp. 328-329]. In order to insure compliance with the program, Anderson was required to report to Buick on the status of his own physical facilities, as well as those of the dealers under his jurisdiction [Tr. Vol. III, pp. 1001-1003].

On the basis of the information thus received, General Motors prepared surveys which were used to police its policy of requiring Anderson and other distributors to undertake substantial expansion of their physical facilities

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[12]The effectiveness of Buick's control over its dealers and distributors is evidenced by the fact that by April 22, 1948, the program was 98 per cent complete nationally [Tr. Vol. III, pp. 916-917; Vol. V, p. 1946].

[13]The Distributor Selling Agreement provided (Section 12):

> "Distributor will maintain a place of business including salesroom, service station, parts and accessories facilities, and used car facilities satisfactory to Seller and will maintain the business hours customary in the trade. Distributor will permit Seller to inspect said place of business at all reasonable times in business hours.
>
> Distributor will not move to or establish a new location, branch sales office, branch service station or place of business including any used car lot or location without the prior consent of Seller." [Tr. Vol. I, p. 70.]

[Hufstader Dep. pp. 319-321]. As a further means of forcing compliance with Buick's policy, facilities of various dealers and distributors were frequently inspected [Tr. Vol. V, p. 1862].

Under the constant urging of General Motors, Anderson invested over $1,000,000 in his facilities during the course of his distributorship, so that his enterprise became, in the words of Buick Sales Manager Hufstader, "housed in magnificent fashion" [Tr. Vol. V, pp. 1955-1956]. Measured by Buick's own standards, Anderson's overall efficiency rating was a high one. Indeed, *it was conceded at the trial that General Motors had no complaint against Anderson's performance during its distributorship* [Tr. Vol. II, pp. 652-653].

The foregoing illustrations are typical of the pattern which was established in the relationship between General Motors and Anderson, a pattern in which General Motors officers acted as overseers of Anderson's operation and guided that operation along policy lines unilaterally laid down by General Motors. At times such guidance assumed the guise of "friendly persuasion," but sterner tactics were employed when necessary, and the threat of force was always present.

The most dramatic illustration of the latter approach involved Anderson's attempt in 1947 to seek re-election to the presidency of the National Automobile Dealer's Association, a nation-wide dealer organization of some 30,000 members. Needless to say, Anderson wished to continue in this office, but Mr. Hufstader, having decided that such was not to be the case, summoned Anderson to Flint and bluntly ordered him not to run for the office. Anderson, subservient to the wishes of his superior, obeyed

Hufstader's order and did not seek election, despite his great desire to do so [Tr. Vol. III, pp. 893-894; Vol. V, pp. 1863-1864, 1938; Hufstader Dep. pp. 543-544].

At times General Motors' control over Anderson was even more open and direct. Thus, during the period from 1936 to 1940, and again from 1942 to 1945, General Motors took direct control of the Anderson operation through its Motors Holding Company subsidiary, then a shareholder, having advanced a portion of the distributor capital. During these periods, Motors Holding held all the voting stock in Anderson and was represented on Anderson's Board of Directors at all times. It was during these periods in which Anderson was operated by Motors Holding Company that many of Anderson's permanent business policies were formulated[14] [Tr. Vol. III, pp. 846-852, 870, 872-873].

Partners in Progress.

The relationship between General Motors and Anderson was an extremely close one.

Thus, Harlow Curtice, General Motors' President and former Buick General Manager, described the relationship as one of "partners in progress," and again as a

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[14]The subject matters covered included: leases and contracts, insurance, banking, accounting and auditing, discounted notes and contracts, forecast of sales and budget of expenses, maintenance of a surplus, advance to officers and other employees, cash, receivables, company cars, new cars, used cars, parts and accessories, miscellaneous merchandise, prepaid expenses, fixed assets, leasehold and improvements and reserves [Tr. Vol. III, p. 873].

Throughout the period of Motors Holding control, Anderson's minutes were prepared in the Motors Holding office [Tr. Vol. III, pp. 872-873].

partnership "in a business sense."[15] According to Curtice, the relationship between General Motors on the one hand and the dealer or distributor on the other, is a "continuing personal relationship," a "close relationship," a "mutually helpful relationship," and one which is "interdependent." In fact, Curtice testified that *"there is no business in which the relationship is so interdependent"* [Curtice Dep. pp. 200, 201, 202-204, 205-206, 212].

William Hufstader, General Motors vice president and former general sales manager of Buick, likewise testified that an unusual mutuality exists between the automobile manufacturer and its dealers and distributors [Hufstader Dep. pp. 404-405].[16]

During his "partnership" with Buick, Anderson devoted his time, efforts and financial resources to carrying out Buick's program in the Pacific Northwest and building

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[15]The closeness of the relationship between General Motors and Anderson is evidenced by the following language in the distributorship agreement [Tr. Vol. I, p. 53]:

> "Third: This is a personal contract, being entered into in reliance upon and in consideration of the personal qualifications of and representations with respect thereto of M. O. Anderson (jointly), the Distributor, or partner(s) in the distributorship, or representative(s) of the Distributor who actively and substantially participate(s) in the ownership and/or operation of the distributorship. The individual or individuals designated shall be responsible for any act or omission of any of Distributor's agents or employees which may be contrary to the purposes and objectives of this Agreement or the obligations of Distributor hereunder. Distributor shall not transfer nor assign this Agreement or any right or obligation hereunder nor make nor suffer to be made any change in the ownership, financial interests or active management of Distributor without the prior written approval of Seller."

[16]One of the best illustrations of this "partnership" relationship between General Motors and Anderson is the "Cooperative Advertising Fund" established by Buick and administered by its General Sales Manager. Contributions to the fund were made by Anderson and General Motors for the purpose of advertising to be used in Anderson's territory [Tr. Vol. I, pp. 79-82].

up good will for himself and for Buick's product. His success in taking over an anemic distributorship and building it up to a position where it ranked third in the nation was recognized by General Motors' own officials.

Thus, Hufstader commended Anderson on bringing up Buick's position in his area from the weak position it occupied when he took over the distributorship in 1936 [Tr. Vol. III, p. 761].

Again, O. L. Waller, Hufstader's successor, commended Anderson "for the outstanding cooperation you have given me in carrying out the various programs coming from this office" [Tr. Vol. III, pp. 1010-1011].

Jerome Nash, Anderson's immediate superior, likewise expressed his appreciation for what he termed Anderson's consistently fine performance and cooperation in marketing Buick products [Tr. Vol. III, pp. 854-855].

As a corollary of this "partnership" relation, General Motors recognized that it owed Anderson an obligation to treat him fairly and to deal with him in good faith. Thus, General Motors president Harlow Curtice testified that General Motors was under an obligation to act in good faith toward Anderson [Curtice Dep. pp. 213-214, 215-217, 236] while Hufstader, vice president and former Buick General Sales Manager, testified that good faith is the essence of a successful franchise relationship. According to Hufstader, General Motors' obligation to act in good faith required it to deal fairly with Anderson [Hufstader Dep. pp. 404-405, 408-411, 456].

Of particular importance to the present case is Hufstader's express recognition that by virtue of its good faith obligation, General Motors was bound to notify a distributor such as Anderson of all matters which might

affect the latter's welfare in connection with the performance of his distributorship. Hufstader testified that

> "any relationship entered into in good faith has to have a mutuality of understanding, objective, and if it be to the interests of either party that plans be discussed that require the thoughtful application of both, then as a matter of good faith I should think that it would be necessary and incumbent upon both parties to discuss it on the basis of mutuality of interest"[17] [Hufstader Dep. p. 414].

General Motors' Dominant Position Vis-a-Vis Anderson.

While Mr. Curtice was correct in likening the General Motors-Anderson relationship to a partnership in terms of its quasi-fiduciary character, by reason of the trust and confidence which Anderson necessarily reposed in General Motors and the closeness of the ties which bound Anderson to General Motors, it is clear that General Motors was the dominant partner, while Anderson occupied a subservient position.

Thus, the written distributorship agreements under which Anderson operated were not negotiated by the "partners" but were unilaterally prepared by General Motors. Periodically, General Motors would herd its distributors together and pass out the printed form of agreement which General Motors had prepared for their signatures [Tr. Vol. III, pp. 1087-1088; Vol. V, pp. 1954-1955; Curtice Dep. pp. 276-277].

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[17]Subsequent to the transcribing of the deposition, Hufstader added the phrase "in accordance with the terms of the agreement between them."

Such passive submission on the part of Anderson is hardly surprising, in view of the relative economic positions of General Motors—the nation's largest corporation —and Anderson, one of Buick's three thousand or more dealers and distributors [Curtice Dep. pp. 51-52; Hufstader Dep. p. 317]. The termination by Anderson of his relationship with Buick would hardly have created a ripple in General Motors' vast empire, whereas General Motors' severance of its relations with Anderson would, and in fact did, result in financial ruin to Anderson.

Thus, Anderson recognized at the time he signed the various distributorship agreements that if he failed to sign he would be out of business, his net worth and the market value of his one-purpose fixed assets would depreciate, and it would have been impossible for him to operate his premises at a profit, since no alternative product was available to him which he could market in a volume comparable to Buick [Tr. Vol. III, p. 1095; Vol. IV, pp. 1338-1340; Vol. V, p. 1701]. That Anderson's fears were justified is corroborated by Hufstader's testimony that Buick would not have shipped any automobiles to any dealer who balked at signing the contract submitted by General Motors [Tr. Vol. V, pp. 1954-1955].

Buick's Policy of Terminating Distributorships.

While Anderson was thus carrying out the Buick program and building up good will for what he thought (and had no reason not to think) was a continuing operation, his "partner," General Motors, was in the process of executing a secretly formulated policy which was to culminate in the elimination of Anderson's distributorship. In fact, under that policy, the very success of Anderson's efforts was, unknown to him, bringing about his own destruction.

The policy in question was one which contemplated the eventual elimination by Buick of all of its distributors, according to a time-table under which various distributors would be eliminated after they had helped establish Buick's position in their area to a point where Buick felt it could carry on more profitably without their services.[18]

The policy was a secret one and, under General Motors' scheme, necessarily so, because the General Motors' officials who formulated the policy obviously recognized that unless a distributor were kept in ignorance of his forthcoming extinction he could not be induced to expand his facilities (and with it the market for General Motors' products in his area), thereby bringing nearer the date of his own destruction.

The origin of that policy, as revealed by the testimony and correspondence of certain key Buick officials, particularly Curtice[19] and Hufstader,[20] dated back to the pre-World War II period. Thus, Harlow H. Curtice, former Buick General Manager, wrote in 1954:

> "I am quite familiar with the policy of Buick Motor Division to the effect that it would handle its wholesale distribution through Divisional Zone Offices directly with its dealers, and the program for carrying

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[18]For convenience, we shall refer to this policy hereafter as "Buick's Distributorship Termination Policy."

[19]Curtice was appointed General Manager of Buick in 1933, General Motors' Vice President in 1948 and President of General Motors in 1953. He has been a Director since 1940, and a member of the Administrative and Operations Policy Committees of the Board since 1946, the latter committee having charge of the operations of the corporation, such as the manufacture, design and sale of the product, research and distribution [Curtice Dep. pp. 7, 9, 10, 11-13].

[20]Hufstader was appointed General Sales Manager of Buick in 1933 and Vice President of General Motors in Charge of the Distribution Staff in 1948 [Hufstader Dep. p. 292].

out that policy which neared completion in 1953 with the discontinuance of the Buick distributorships and the replacement thereof with zone operations in the Pacific Northwest, since I, as General Manager of Buick Motor Division approved that policy and actively participated in the effectuation of it over a period of years in different sections of the country"[21] [Tr. Vol. V, pp. 1956-1958].

Curtice testified that during the years immediately preceding World War II (1937-1941), he and Hufstader, then General Sales Manager of Buick, discussed on numerous occasions the matter of substituting factory zone operations in place of private distributorships [Curtice Dep. pp. 137-141, 142-143, 145-146, 149-151]. Commencing in 1937 or 1938 various studies and surveys were made at the instance of Curtice and Hufstader, comparing the cost of private distributorships[22] with the estimated cost of director factory distribution [Tr. Vol. V, pp. 1960-1962; Vol. VI, pp. 2204-2205]. Curtice testified that actually such studies were not essential in view of the fact that both Curtice and Hufstader knew all along that as production and sales increased Buick would replace its private distributors with direct factory zone operations [Curtice Dep. pp. 139-140].

Mr. Belfie, who conducted certain studies which led to the establishment of private distributorships in the Pacific Northwest, testified that he was aware at about the time

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[21]Hufstader's testimony is to the same effect, although he quibbled over the use of the word "policy," apparently preferring the word "program" although he eventually conceded that he regarded the words "program" and "policy" as synonymous in the present context [Tr. Vol. V, pp. 1958-1959].

[22]Anderson was not advised that such surveys were being made [Tr. Vol. V, 1960].

the Anderson distributorship was established that it was Buick's intention to terminate private distributorships and substitute factory zone operations in their place, and that Jerome Nash, Pacific Coast Regional Manager for Buick and Anderson's immediate superior, was probably aware of the program, although neither Belfie nor Nash ever advised M. O. Anderson or any one in the Anderson organization of this fact [Tr. Vol. VI, pp. 2056-2057, 2071, 2124-2125; Vol. V, pp. 1950-1951].

Commencing in 1944, Buick set about methodically to execute its policy of eliminating its "partners in progress" as soon as it became profitable to General Motors to do so [Curtice Dep. pp. 149-151].

From 1936 to 1944, there were eight Buick distributorships: Noyes in Boston, Howard in California, Garber in Saginaw, and five distributorships, including Anderson, in the Pacific Northwest [Tr. Vol. V, pp. 1920-1921; Curtice Dep. pp. 129-133].

The first step in the execution of Buick's program was the elimination of Noyes in 1944.

The second step was the elimination of Howard in 1947.[23]

What Curtice describes as the "third step" was the elimination of the five Northwest distributorships, including Anderson, in 1953 [Curtice Dep. pp. 145-146].

The execution of this "third step" actually began in September, 1951, at which time Ivan Wiles, Buick General Manager, and Albert Belfie, Buick Sales Manager, decided

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[23]Hufstader testified that he told Howard in 1944 that General Motors had decided to terminate his distributorship and that upon termination Buick would take over the Howard territory as a zone operation [Hufstader Dep. pp. 482-483].

that the Northwest distributorships appeared "ripe" for "harvesting" by Buick. Accordingly, at their direction, Mr. Wilcox of General Motors made certain studies comparing the projected cost of a factory zone with distributor overrides in the Pacific Northwest, this being the amount whereby zone operation would be less expensive for Buick than private distributor operation. The study originally showed an excess of override over estimated expenses of $171,000.00. Subsequently, about April 1, 1952, the study was revised so as to indicate an excess of nearly $184,000.00 and it was decided that the time had come under Buick's long-established but undisclosed policy to establish a direct factory zone in the Pacific Northwest [Tr. Vol. VI, pp. 2095-2096, 2134-2139, 2197].

In March or April of 1952, Belfie advised Hufstader of his plans to advise the Northwest distributors that their distributorships were to be terminated, effective July 1, 1953. Hufstader stated that this was in keeping with the program [Hufstader Dep. pp. 558-560]—an obvious reference to the general policy which he and Curtice had developed during the pre-World War II period, under which the Noyes and Howard distributorships had already been eliminated. Subsequently, Hufstader discussed the matter with Ivan Wiles, Buick General Manager, who likewise indicated that the time for terminating the Pacific Northwest distributorships was at hand [Hufstader Dep. p. 562].

General Motors' Failure to Disclose.

While General Motors was thus carrying out its policy of eliminating Buick distributors, it never disclosed that policy, or Buick's termination of the Noyes and Howard distributorships pursuant thereto, to its "partner" Anderson [Curtice Dep. pp. 149-151; Tr. Vol. III, pp. 889-892;

Vol. IV, p. 1386; Vol. V, pp. 1967-1971; Hufstader Dep. pp. 499, 541, 601; Tr. Vol. VI, pp. 2056-2057, 2071, 2124, 2064-2065] and this despite the fact that:

(1) *Various General Motors officials, including Hufstader, who had formulated the policy, and Belfie, who concededly was aware of its existence, had numerous contacts with Anderson during this period, in the course of which they discussed other aspects of Buick's plans for the future, as well as Anderson's own plans to expand his facilities* [Tr. Vol. III, pp. 904, 956; Vol. V, pp. 1967-1971; Curtice Dep. p. 151; Hufstader Dep. pp. 496, 500-501, 531], and

(2) *Jerome Nash, Anderson's "friend" and immediate superior, had written to Anderson in May, 1948: "I will write you from time to time and visit about matters of importance as it affects Buick and Anderson Buick, and will always try to keep you well informed how things are going"* [Tr. Vol. VI, pp. 2053-2056]. *By this Nash meant, according to his own testimony, that he would advise Anderson how things were trending in Anderson's relation with Buick* [Tr. Vol. VI, pp. 2053-2056].

General Motors' Representations as to Long-Range Nature of Anderson's Distributorship.

On the contrary, Anderson's superiors in General Motors were constantly speaking in terms of the "long-range" nature of the franchise.

Thus, in April, 1943, Nash wrote Anderson: "Buick will need the staunchest kind of people to do business with after this war is over, and we will have them in our key outlets" [Tr. Vol. III, pp. 864-865]. Again, in 1945, Nash advised Buick distributors that an expansion of facilities would be fully justified, although Nash testified

that such expansion would not have been justified on a short-term basis [Tr. Vol. III, pp. 883-884; Vol. V, pp. 2047-2048].

Likewise, in June, 1950, Belfie, who at the time was admittedly aware of Buick's termination policy and was soon to become instrumental in carrying it into execution by eliminating the Northwest distributorships, wrote Anderson of the cooperation of Buick dealers in carrying Buick to greater heights [Tr. Vol. III, p. 1012].

Again, William Hufstader, then Buick Sales Manager, in approving Anderson's "Pledge to New Car Buyers," referred to it as excellent merchandising over the "long pull" [Hufstader Dep. pp. 526-527].

Moreover, General Motors' President Harlow Curtice testified that the relationship between General Motors and the vast majority of its dealers has been a continuing, long-range relationship, a majority receiving their renewals annually, and that the dealers had come to understand it as such [Curtice Dep. pp. 157, 158-159, 162, 166].

As further evidence of the long-term nature of Anderson's distributorship, General Motors provided special training courses for Anderson's sons, along with the sons of other dealers and distributors, covering all phases of dealership management [Tr. Vol. IV, pp. 1359-1360; Hufstader Dep. pp. 393, 395-396].

Whenever Anderson evidenced any concern to his superiors as to the duration of his distributorship, his mind was quickly put at rest.[24]

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[24]Such inquiries were in fact curtailed by Buick's Sales Manager, Belfie, in the fall of 1951 when he severely criticized Anderson for discussing sales policies with Mr. Wiles, Buick's General Manager. At the time, Belfie advised Anderson that he was never to discuss sales policies with anyone but Ruhe (Nash's successor as Pacific Regional Manager), Nash, or Belfie [Tr. Vol. III, pp. 1012-1015; Vol. V, p. 1914].

Thus, in 1947, Anderson, having heard a rumor that the Howard distributorship in California had been terminated, phoned Nash in San Francisco, told him he was disturbed by the rumor, and inquired as to its truth. Nash confirmed the truth of the rumor but told Anderson not to be disturbed. Nash emphasized the importance of keeping the matter confidential so as not to disconcert the other Northwest distributors[25] [Tr. Vol. V, pp. 2004-2005; Vol. VI, pp. 2066-2069].

Anderson testified that he expressed concern to Nash regarding a projected expansion of Anderson's facilities and that Nash replied that the Howard distributorship was terminated because they had not done an adequate job in obtaining market penetration for Buick, but this did not apply to Anderson. Anderson testified that Nash assured him that Anderson should go ahead with his program, as there was nothing to worry about as long as Anderson continued to do a proper job, and that he (Anderson) had implicit faith in what Nash told him [Tr. Vol. III, pp. 895-902].[26] Nash testified that he told Anderson "This does not concern you" and that he felt he had put Anderson's mind at rest [Tr. Vol. V, p. 2004; Tr. Vol. VI, p. 2069].

Again, in 1951, when Anderson was considering borrowing $500,000 secured by a long-term mortgage on his

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[25]These other distributors were later to be victims of Buick's secret policy.

[26]Anderson testified that in approximately 1947 he told Nash that he thought General Motors' change from distributorship contracts of indefinite duration to contracts of one-year duration was unusual, but Nash assured him he had nothing to worry about as long as he did a satisfactory job [Tr. Vol. III, pp. 1092-1093]. Similar assurances had been given to Anderson at the time he undertook the distributorship in 1936 (see p. 4, *supra*).

premises in an effort to meet the working capital requirements established for him by General Motors, Anderson consulted General Motors regarding the permanency of his distributorship. According to the testimony of M. O. Anderson and his son Howard, they met with Nash and Ruhe[27] of General Motors on November 9, 1951, in San Francisco, and sought the advice of the latter before taking on the obligation. Anderson stated that he wanted some assurance that he would have sufficient time under the distributorship to pay off the mortgage. Anderson indicated some concern because of the termination of the Howard distributorship, but Nash explained that Anderson's situation was different than Howard's, because Howard had not been doing an adequate job, whereas Anderson had a very fine operation. Nash told Anderson he did not have a thing to worry about in terms of getting the mortgage repaid and indicated his approval of Anderson's plans to improve his capital position. Anderson then telephoned the representative of the lending agency and indicated his willingness to go ahead with the mortgage and subsequently executed a 15-year mortgage for $500,000 [Tr. Vol. III, pp. 1017-1028; Vol. IV, pp. 1378-1382; Bauer Dep. pp. 3, 4, 14-16, 17]. While Nash's testimony as to the 1951 meeting differs in some respects from that of Anderson, Nash did acknowledge that the meeting took place and that Anderson told of his negotiations in connection with the $500,000 loan [Tr. Vol. V, pp. 2007-2010; Vol. VI. p. 2076].[28]

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[27]In June, 1950, Nash was promoted to Assistant General Sales Manager, with George Ruhe succeeding Nash as Pacific Regional Sales Manager [Ruhe Dep. p. 8, lines 14-19; p. 13, lines 1-17].

[28]Ruhe testified that at the San Francisco meeting, Anderson informed Nash and Ruhe of the $500,000 mortgage loan which Anderson said would enable him to meet General Motors' demands as to Anderson's working capital [Ruhe Dep. p. 73, line 11, to p. 74, line 1; p. 75, lines 8-16].

Anderson's Reliance on Long-Range Nature of Distributorship.

It is not surprising, therefore, to find that Anderson believed that his distributorship would be continued as long as he achieved satisfactory market penetration and did a satisfactory job for Buick, and that Anderson invested substantial sums in reliance upon that belief [Tr. Vol. V, pp. 1633-1634].

Anderson testified that had he known of Buick's Distributorship Termination Policy, among other things he would not have purchased the stock of the Westlake Corporation, which owned the premises he was leasing, in 1944, nor would the Anderson Company have acquired the stock in 1947. Neither would Anderson have acquired a lot for $40,000 in the latter part of 1945 nor constructed Building Number 3 on the lot for $275,000, nor would he have made the $500,000 mortgage loan. Neither would he have advertised on the scale he did if he had known that Buick planned to terminate his distributorship before that advertising bore fruit [Tr. Vol. III, pp. 956, 957, 1027-1028, 1037-1038, 1062-1063]. The record is replete with instances reflecting reliance to Anderson's detriment.

General Motors' Termination of Anderson's Distributorship.

In July, 1952, the effects of General Motors' secret Distributorship Termination Policy, though not the policy itself, were brought home to Anderson when, in a meeting of distributors called by General Motors in Portland, Belfie announced that Buick's five distributorships in the Pacific Northwest area were to be terminated as of June 9, 1953, with Buick taking over the area as a direct factory

zone operation, which Buick did in fact do on approximately the latter date [Tr. Vol. III, pp. 1046-1047; Vol. VI, pp. 1383-1384; Vol. V, pp. 2011-2012; Vol. VI, p. 2097; Ruhe Dep. p. 18, line 11, to p. 19, line 8]. Even then, however, Anderson was not advised of the secret policy which had thus culminated in the elimination of his distributorship.

Anderson's Discovery of General Motors' Distributorship Termination Policy.

In fact, the existence of such a policy was not brought home to Anderson until October of 1953, at which time Hufstader let the "cat out of the bag" by explaining to an inquiring stockholder that the termination of Anderson was merely one step in effectuating Buick's long-range policy of eliminating distributorships. Hufstader wrote:

> "Prior to the war, it became apparent to the car divisions of General Motors Corporation which operate through zone officers, as it had with other manufacturers, that with a large volume of production in an increasingly competitive market with all the problems incident thereto, the wholesale distribution of cars could best be handled by factory representatives and zone operations in many of the areas in which distributors were operating. Before any study was completed the war intervened. Subsequently, the matter was given further consideration and these car divisions have, over a period of time in the post-war years, consistently followed the practice of eliminating distributorships and undertaking the wholesale operations where circumstances would indicate such action to be beneficial from a distribution and service standpoint.

"The elimination of the Buick Motor Division distributors in the Pacific Northwest represents the final transaction undertaken by Buick under this practice" [Tr. Vol. III, pp. 1070-1073; Vol. V, p. 1877; Pltff's Ex. No. 81].

As heretofore indicated, prior to seeing this letter, Anderson had never been informed by Nash, Belfie, Curtice, or anyone else of the plan referred to in the letter [Tr. Vol. III, pp. 1070-1075].

Proceedings in the Trial Court.

Subsequently, on June 30, 1955, Anderson commenced the present action. The Complaint in its final form [Tr. Vol. IV, p. 1342; Vol. II, pp. 396-407] set forth two claims, both sounding in fraud, the first based upon General Motors' non-disclosure to Anderson of its policy regarding termination of distributorships, the second premised on Nash's 1947 and 1951 representations to Anderson to the effect that Anderson's distributorship would not be terminated arbitrarily.

During the trial, the Court ruled, as a matter of law, that Anderson could not recover for any representations made by Nash in 1947, and the jury was therefore precluded from considering Anderson's claims in this regard as an independent basis of relief [Tr. Vol. IV, pp. 1573-1574]. The Court likewise dismissed as to M. O. Anderson individually [Tr. Vol. V, pp. 1713-1718]. The remaining issues were submitted to the jury.

Plaintiff requested the Court to instruct the jury that the relationship between General Motors and Anderson gave rise to a duty of mutual trust and confidence in their business dealings, by virtue of which General Motors was under a duty to disclose to Anderson material facts that were peculiarly within the knowledge of General Motors,

and of which plaintiff was ignorant[29] [Tr. Vol. II, p. 415]. The Court denied plaintiff's request, stating [Tr. Vol. II, p. 415]: "I have determined that the relationship is an issue of fact which should be submitted to the jury for its determination and finding."

The Court directed the jury to answer some 28 questions formulated by the Court in addition to rendering a general verdict.[30]

The questions submitted and the jury's answers thereto were as follows [Tr. Vol. II, pp. 500-503]:

> "1. On November 9, 1951, did Jerome B. Nash in words or substance state and represent to M. O. Anderson that Anderson Buick Company need not concern itself about termination of its distributor-

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[29]Plaintiff's proposed Instruction No. 3 was as follows [Tr. Vol. II, p. 415]:

> "You are instructed that the relationship between the defendant General Motors Corporation as manufacturers and the plaintiff Anderson Buick Company as its distributor was a relationship that gave rise to a duty of mutual trust, confidence and loyalty in their mutual business dealings with respect to the subject matter thereof. Such a duty includes the duty of General Motors Corporation to disclose to Anderson Buick Company any material matter respecting the subject matter of their business dealings that was peculiarly within the knowledge of the defendant and as to which the plaintiff was ignorant."

[30]Plaintiff objected to the submission of such special questions

> "on the ground that they are too numerous and lengthy and detailed and because of their large number, now just described, they, in effect operate to deprive the Plaintiff a fair hearing of the issues covered in great detail in the instructions" [Tr. Vol. VI, pp. 2363-2364].

Plaintiff asserted that

> "a general verdict in light of the detailed instructions would adequately and fairly protect the rights of the parties, whereas the submission to the jury of these numerous interrogatories represents an excessive burden upon the plaintiff in the fair and expeditious determination of the issues created by the pleadings and resulting from the proof of the issues in this case" [Tr. Vol. VI, pp. 2363, 2364].

ship as long as it continued to penetrate the market and maintain price class performance and for at least so long a period as was required to amortize the $500,000 mortgage?

Answer: No.

2. Was the making of such a statement within the scope of the authority of Jerome B. Nash?

Answer: No.

3. Did General Motors during the period 1937-1941 formulate and adopt a policy which in substance provided for the termination of the distributorship of Anderson Buick Company after it had developed the market for Buick automobiles, parts and accessories in the territory assigned to it to a point when it would be more profitable for General Motors itself to distribute?

Answer: No.

4. *Did General Motors have such a policy on November 9, 1951?*

Answer: *Yes.*

5. Did General Motors continuously have such a policy for the period from 1941 to July 10, 1952?

Answer: No.

6. If you have found that this statement of Jerome B. Nash was made on November 9, 1951,

A. Was the statement true or false?

B. Did Anderson Buick Company believe the statement to be true?

C. Did Anderson Buick Company act in reliance upon the statement?

D. Was it reasonable for Anderson Buick to act in reliance upon it?

E. Did Anderson Buick Company sustain damage as a result of such reliance and action?

F. In that event what was the amount of such damage?

Answer: (Questions not answered.)

7. *Was the relationship between Anderson Buick Company and General Motors Corporation such a relationship as required the disclosure of such a policy, if you have found that there was such a policy, by General Motors to Anderson Buick Company?*

Answer: No.

8. *If you have found that there was such a policy of General Motors was that policy known to Anderson Buick Company or should it have been known to Anderson Buick Company in the exercise of ordinary business prudence?*

Answer: No.

9. (a) Did Anderson Buick Company take action in ignorance of a matter which General Motors was required to disclose to Anderson Buick Company because of the relationship between Anderson Buick Company and General Motors?

Answer: No.

(b) Did Anderson Buick Company sustain damage as a result of such action?

Answer: (Question not answered.)

(c) What was the amount of such damage, if any, which Anderson Buick Company so sustained?

Answer: (Question not answered.)

10. A. With respect to the annual agreements, were the following agreements executed by Anderson Buick Company because of business compulsion as that term has been defined for you. Answer Yes or No with respect to each separate agreement dated—

I. November 1, 1947. Answer: No.

II. November 1, 1949. Answer: No.
III. November 1, 1949. Answer: No.
IV. November 1, 1950. Answer: No.
V. November 1, 1951. Answer: No.
VI. November 1, 1952. Answer: No.

B. With respect to the annual agreements, answer with respect to each of the agreements listed here, whether plaintiff signed them because of a non-disclosure of a matter which General Motors was required to make to Anderson Buick Company. Answer Yes or No with respect to each separate agreement dated—

I. November 1, 1947. Answer: No.
II. November 1, 1949. Answer: No.
III. November 1, 1949. Answer: No.
IV. November 1, 1950. Answer: No.
V. November 1, 1951. Answer: No.
VI. November 1, 1952. Answer: No" (emphasis added).

The jury's general verdict was in favor of defendant General Motors [Tr. Vol. II, p. 443][31] and judgment was entered thereon [Tr. Vol. II, pp. 500-503]. Thereafter, plaintff moved for a new trial [Tr. Vol. II, pp. 450-462], said motion was denied [Tr. Vol II, p. 504] and the present appeal was taken [Tr. Vol. II, p. 521].

Plaintiff filed objections to the cost bill submitted by defendants [Tr. Vol. II, pp. 467-470]. Among the items

[31]The Court had under consideration a motion by defendant to dismiss as to ABC Packard Inc. [Tr. Vol. V, pp. 1713-1718]. After the jury had rendered its verdict, the Court indicated that it was in accord with the jury's findings and that it was granting defendant's motion [Tr. Vol. II, p. 444; Vol. VI, pp. 2468-2479]. However, the Court subsequently entered judgment on the jury verdict [Tr. Vol. II, pp. 500-503] and we have so treated the judgment on the present appeal.

in dispute was the cost of preparing a reporter's transcript [Tr. Vol. II, p. 469]. This item, amounting to $2,202.05, was disallowed by the Clerk [Tr. Vol. II, pp. 495-496], but was subsequently allowed by the Court on defendants' Motion to Retax Costs [Tr. Vol. II, pp. 504, 527].

Specification of Errors.

I.

THE COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT GENERAL MOTORS OWED ANDERSON A DUTY TO DISCLOSE AS A MATTER OF LAW.

Plaintiff requested the Court to instruct the jury as follows:

> "You are instructed that the relationship between the defendant General Motors Corporation as manufacturer and the plaintiff Anderson Buick Company as its distributor was a relationship that gave rise to a duty of mutual trust, confidence and loyalty in their mutual business dealings with respect to the subject matter thereof. Such a duty includes the duty of General Motors Corporation to; disclose to Anderson Buick Company any material matter respecting the subject matter of their business dealings that was peculiarly within the knowledge of the defendant and as to which the plaintiff was ignorant" [Tr. Vol. II, p. 415].

The Court denied plaintiff's request, explaining that in the Court's view this was a matter for determination by the jury [Tr. Vol. II, p. 415].

It is submitted that the Court erred in failing to determine as a matter of law the existence of a duty on the part of General Motors to disclose its Distributorship Termination Policy to Anderson and in failing to instruct the jury accordingly, as requested by plaintiff.

II.

THE COURT ERRED IN REFUSING TO SUBMIT TO THE JURY ANDERSON'S CLAIM BASED ON NASH'S 1947 REPRESENTATIONS TO ANDERSON.

Among the grounds upon which Anderson sought recovery were certain representations made by Jerome Nash to Anderson in 1947 to the effect that Anderson's distributorship would not be terminated as long as Anderson rendered proper performance [Tr. Vol. II, pp. 403-404]. During the trial, the Court ruled, as a matter of law, that Anderson could not recover for any representations made by Nash in 1947, and the jury was therefore precluded from considering Anderson's claims in this regard as an independent basis of relief [Tr. Vol. IV, pp. 1573-1574].

It is submitted that the Court erred in taking from the jury the issue of Anderson's right to recover for Nash's 1947 representations.

III.

THE COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR A DIRECTED VERDICT AND MOTION TO DISMISS PLAINTIFF'S ACTION FOLLOWING THE VEDICT OF THE JURY [Tr. Vol. II, p. 444; Vol. VI, pp. 2468-2479].

IV.

THE COURT ERRED IN INSTRUCTING THE JURY THAT ANDERSON WAS PRECLUDED FROM CLAIMING THAT HE SIGNED THE DISTRIBUTORSHIP AGREEMENT OF NOVEMBER 1, 1952, BECAUSE OF GENERAL MOTORS' NONDISCLOSURE OF ITS DISTRIBUTORSHIP TERMINATION POLICY.

The Court instructed the jury as follows:

"I charge you that since the final agreement of November 1, 1952, was entered into after July 10, 1952—the date of the Portland meeting—there may

in dispute was the cost of preparing a reporter's transcript [Tr. Vol. II, p. 469]. This item, amounting to $2,202.05, was disallowed by the Clerk [Tr. Vol. II, pp. 495-496], but was subsequently allowed by the Court on defendants' Motion to Retax Costs [Tr. Vol. II, pp. 504, 527].

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It is submitted that the Court erred in taking from the jury the issue of Anderson's right to recover for Nash's 1947 representations.

III.

THE COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR A DIRECTED VERDICT AND MOTION TO DISMISS PLAINTIFF'S ACTION FOLLOWING THE VEDICT OF THE JURY [Tr. Vol. II, p. 444; Vol. VI, pp. 2468-2479].

IV.

THE COURT ERRED IN INSTRUCTING THE JURY THAT ANDERSON WAS PRECLUDED FROM CLAIMING THAT HE SIGNED THE DISTRIBUTORSHIP AGREEMENT OF NOVEMBER 1, 1952, BECAUSE OF GENERAL MOTORS' NONDISCLOSURE OF ITS DISTRIBUTORSHIP TERMINATION POLICY.

The Court instructed the jury as follows:

> "I charge you that since the final agreement of November 1, 1952, was entered into after July 10, 1952—the date of the Portland meeting—there may

in dispute was the cost of preparing a reporter's transcript [Tr. Vol. II, p. 469]. This item, amounting to $2,202.05, was disallowed by the Clerk [Tr. Vol. II, pp. 495-496], but was subsequently allowed by the Court on defendants' Motion to Retax Costs [Tr. Vol. II, pp. 504, 527].

Specification of Errors.

I.

THE COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT GENERAL MOTORS OWED ANDERSON A DUTY TO DISCLOSE AS A MATTER OF LAW.

Plaintiff requested the Court to instruct the jury as follows:

> "You are instructed that the relationship between the defendant General Motors Corporation as manufacturer and the plaintiff Anderson Buick Company as its distributor was a relationship that gave rise to a duty of mutual trust, confidence and loyalty in their mutual business dealings with respect to the subject matter thereof. Such a duty includes the duty of General Motors Corporation to; disclose to Anderson Buick Company any material matter respecting the subject matter of their business dealings that was peculiarly within the knowledge of the defendant and as to which the plaintiff was ignorant" [Tr. Vol. II, p. 415].

The Court denied plaintiff's request, explaining that in the Court's view this was a matter for determination by the jury [Tr. Vol. II, p. 415].

It is submitted that the Court erred in failing to determine as a matter of law the existence of a duty on the part of General Motors to disclose its Distributorship Termination Policy to Anderson and in failing to instruct the jury accordingly, as requested by plaintiff.

II.

THE COURT ERRED IN REFUSING TO SUBMIT TO THE JURY ANDERSON'S CLAIM BASED ON NASH'S 1947 REPRESENTATIONS TO ANDERSON.

Among the grounds upon which Anderson sought recovery were certain representations made by Jerome Nash to Anderson in 1947 to the effect that Anderson's distributorship would not be terminated as long as Anderson rendered proper performance [Tr. Vol. II, pp. 403-404]. During the trial, the Court ruled, as a matter of law, that Anderson could not recover for any representations made by Nash in 1947, and the jury was therefore precluded from considering Anderson's claims in this regard as an independent basis of relief [Tr. Vol. IV, pp. 1573-1574].

It is submitted that the Court erred in taking from the jury the issue of Anderson's right to recover for Nash's 1947 representations.

III.

THE COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR A DIRECTED VERDICT AND MOTION TO DISMISS PLAINTIFF'S ACTION FOLLOWING THE VEDICT OF THE JURY [Tr. Vol. II, p. 444; Vol. VI, pp. 2468-2479].

IV.

THE COURT ERRED IN INSTRUCTING THE JURY THAT ANDERSON WAS PRECLUDED FROM CLAIMING THAT HE SIGNED THE DISTRIBUTORSHIP AGREEMENT OF NOVEMBER 1, 1952, BECAUSE OF GENERAL MOTORS' NONDISCLOSURE OF ITS DISTRIBUTORSHIP TERMINATION POLICY.

The Court instructed the jury as follows:

> "I charge you that since the final agreement of November 1, 1952, was entered into after July 10, 1952—the date of the Portland meeting—there may

be no claim by plaintiff that this agreement was signed in reliance upon the alleged misrepresentation or because of the alleged nondisclosure" [Tr. Vol. VI, pp. 2419-2420].

The plaintiff excepted to the foregoing instruction as follows [Tr. Vol. VI, p. 2243]:

"Mr. Horowitz: Referring now to Section IX of Court's Exhibit 1, on page 9 thereof, being the second sentence in the second paragraph of that page, commencing with the words, 'I charge you that since the final agreement of November 1, 1952,' and ending with the words, 'of the alleged nondisclosure,' I except to the giving of that portion of the charge in that it deprives the plaintiff of the right to claim that the signing of the November 1st, 1952 agreement was made in ignorance of the knowledge of the fraud, either that the misrepresentation was fraudulently made, referring now to the misrepresentation of November 9, 1951, and November, 1947, and knowledge that there was (2423) a fraudulent nondisclosure, by stating as a matter of law that there may be no claim by the Plaintiff that this agreement was signed in reliance upon alleged misrepresentation, or because of the alleged nondisclosure the Plaintiff is deprived of an opportunity to contend that at the date of the signing of the November 1st, 1952 contract he did not have the knowledge which he acquired on October 23, 1953, when for the first time he was made aware of the policy of terminating distributors as therein set forth.

The Court: Your exception is noted upon the record.

I decline to alter, change or modify that charge with reference to the agreement of November 1st, 1953. You have the exception noted upon the record."

V.

THE COURT ERRED IN AWARDING GENERAL MOTORS AS AN ITEM OF COSTS COURT REPORTER'S FEES FOR PREPARING A TRANSCRIPT OF THE PROCEEDINGS AT THE TRIAL.

Among the items included in General Motors' cost bill was the cost of preparing a transcript of proceedings at the trial [Tr. Vol. II, p. 464]. Anderson filed formal objections to the inclusion of this item, on the ground that the cost of a Reporter's Transcript is not properly recoverable as costs under either the local court rule or general practice where, as in the instant case, the transcript is not ordered by the court but is prepared for the benefit of the defendant [Tr. Vol. II, pp. 469, 473].

The Clerk, in taxing costs, refused to allow this item [Tr. Vol. II, pp. 495-496], but the trial court, on General Motors' Motion to Retax Costs, permitted General Motors to recover the cost of the transcript [Tr. Vol. II. p. 504], and in so doing committed error which should be rectified by this Court.

Summary of Argument.

The principal issue on this appeal is whether the court should have determined, as a matter of law, that General Motors owed Anderson a duty to disclose General Motors' Distributorship Termination Policy. The failure of the Court to determine this issue, as requested by plaintiff, was of decisive importance because the jury's special verdicts, amply supported by the evidence, established all of the remaining elements of Anderson's cause of action, namely, (1) that General Motors had a policy of terminating distributorships whenever it became more profitable to General Motors to do so, (2) that General Motors failed to disclose that policy to Anderson, and (3) that Anderson was not chargeable with knowledge of that policy. It is

likewise clear that Anderson suffered damages as a result of such non-disclosure. Therefore, if the Court had determined that General Motors had a duty to disclose to Anderson its Distributorship Termination Policy, the judgment below would have been in favor of Anderson rather than of General Motors.[32]

It is the position of appellant that, in light of the nature of the relationship existing between General Motors and Anderson, the Court below should have determined that General Motors was, as a matter of law, under an obligation to disclose to Anderson its Distributorship Termination Policy.

At the outset, it should be noted that the question whether a duty to disclose exists in a given case is one for determination by the court, rather than the jury, for the duty of disclosure is not one which a party voluntarily assumes, but is *an obligation which the law imposes upon him as a consequence of his relationship to the party toward whom the duty is owing.* Accordingly, the Court below should have considered the nature of the relationship between General Motors and Anderson in order to determine whether a duty to disclose existed. Such a consideration could lead to no other conclusion than that

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[32]In view of the fact that the court submitted 28 questions to the jury, and gave instructions to the jury which consumed over 50 pages of printed transcript, it is surprising that the jury was able to arrive at a verdict at all. It is even more notable that the plaintiff was able to obtain a favorable determination by the jury on all but one of the numerous issues submitted to the jury on plaintiff's non-disclosure theory [Tr. Vol. VI, pp. 2374-2428; 2459-2466].

General Motors was, as a matter of law, under an obligation to disclose to Anderson its Distributorship Termination Policy.

First of all, the relationship of a manufacturer to his distributor is generally recognized as including incidents of the principal-agency relationship, including an obligation on the part of the manufacturer-principal to disclose to his distributor-agent all matters pertinent to the agency. Regardless how the manufacturer-distributor relationship is classified, however, the courts have recognized that such a relationship imposes upon each party an obligation to deal with the other in good faith, including, of course, an obligation to make full disclosure of material facts.

It is not necessary, however, to rely solely upon the general rule governing the manufacturer-distributor relation, because it is clear that the particular relationship with which we are here concerned was such as to impose upon General Motors, as a matter of law, a duty to make full disclosure to Anderson of General Motors' Distributorship Termination Policy. This follows from the fact that Anderson, while nominally independent, was, in reality, under the complete domination and control of General Motors. Through such control devices as personal inspections, written reports, meetings and zone manuals, General Motors kept Anderson's entire operation under the closest possible scrutiny in order to insure that Anderson carried out the policies which General Motors unilaterally established for him. Anderson, in turn, was required to obtain the approval of his General Motors' superiors be-

fore undertaking any business venture. Such complete subservience to General Motors on the part of Anderson is readily understandable, of course, in light of the constant threat of economic ruin with which Anderson was faced in the event he were to disobey the commands of his General Motors superiors. Under such circumstances, it is not surprising to find that General Motors was able to compel Anderson to increase his working capital, in accordance with General Motors' master plan, by borrowing $500,000 from a lending agency, although such an increase was not necessary from the standpoint of Anderson's own operation.

As a corollary of General Motors' domination and control of Anderson, and the resulting trust and confidence which Anderson reposed in his General Motors superiors, *General Motors had a duty as a matter of law to disclose to Anderson all matters of importance affecting his distributorship.* In fact, Anderson's superiors in the General Motors organization appeared to recognize their obligation in this regard, *albeit* they did not fulfill it with respect to the matter at issue.

Nevertheless, when Anderson's superiors in General Motors had formulated a policy under which they planned to eliminate Anderson's distributorship as soon as it became profitable to do so, they failed to disclose this fact to Anderson, but instead encouraged him to invest substantial sums in his distributorship, from which they knew he would never have an opportunity to reap the harvest to which he was entitled.

(See also topical index)

ARGUMENT.

SPECIFICATION OF ERROR NO. I.

I.

The Court Erred in Failing to Instruct the Jury That General Motors Owed Anderson, as a Matter of Law, a Duty to Disclose Its Distributorship Termination Policy.

A. If, as Plaintiff Contends, There Was a Duty to Disclose as a Matter of Law, the Judgment Below Must Be Reversed, Because the Jury's Special Verdicts, Amply Supported by the Evidence, Establish All of the Remaining Elements of Plaintiff's Claim.

As heretofore indicated, Anderson's claim against General Motors is premised on General Motors' failure to disclose to Anderson General Motors' policy of terminating distributorships whenever it became more profitable to General Motors to do so. In order to recover on such a non-disclosure theory, it is necessary to establish:

1. The existence of certain facts known to party "A".
2. A duty on the part of "A" to disclose those facts to "B".
3. A failure by "A" to disclose the facts to "B".
4. Lack of knowledge of those facts on the part of "B" independent of "A's" disclosure.
5. Damage to "B" resulting from "B's" action or inaction resulting from such non-disclosure.

Ikeda v. Curtis, 43 Wash. 2d 449, 261 P. 2d 684 (1953);

Perkins v. Marsh, 179 Wash. 362, 37 P. 2d 689 (1934);

23 *Am. Jur.* 854;

Restatement of Torts, Sec. 551;

37 *C. J. S.* 244-245.

(See also cases cited *infra,* pp. 46-83.)

As stated in 23 *Am. Jur.* 854:

> "The principle is basic in the law of fraud as it relates to non-disclosure that a charge of fraud is maintainable where a party who knows material facts, is under a duty, under the circumstances, to speak and disclose his information, but remains silent . . ."

Again in 37 *C. J. S.* 244-245 the author notes:

> "An exception to the rule that mere silence is not fraud exists where the circumstances impose on a person a duty to speak and he deliberately remains silent. It is well settled that the suppression of a material fact which a party is bound in good faith to disclose is equivalent to a false representation. Where the law imposes a duty on one party to disclose all material facts known to him and not known to the other, silence or concealment in violation of this duty with intent to deceive will amount to fraud as being a deliberate supression of the truth and equivalent to the assertion of a falsehood. The concealment of a fact which one is bound to disclose is an indirect representation that such fact does not exist, and constitutes fraud. . . ."

The Washington authorities are in accord with the foregoing rules.

Ikeda v. Curtis, supra, 43 Wash. 2d 449, 261 P. 2d 684;

Oates v. Taylor, 31 Wash. 898, 199 P. 2d 924, 928 (1948);

Perkins v. Marsh, supra, 179 Wash. 362, 37 P. 2d 689;

Cf., Normile v. Denison, 109 Wash. 205, 212, 186 Pac. 305 (1919).

Measured by the foregoing standard, it is clear that in order for Anderson to recover in the instant case upon the basis of General Motors' failure to disclose, it was necessary for Anderson to establish:

1. That General Motors had a policy of terminating distributorships whenever it became more profitable to do so.

2. That General Motors had a duty to disclose that policy to Anderson.

3. That General Motors failed to disclose that policy to Anderson.

4. That Anderson was not chargeable with knowledge of that policy, independent of any disclosure by General Motors.

5. That Anderson suffered damage attributable to such non-disclosure.

The jury's answers to the special questions submitted reveal that, aside from the duty to disclose, each of these elements were in fact established by Anderson to the jury's satisfaction. Moreover, a review of the evidence indicates that the jury's determination that those elements were established is amply supported.

1. *General Motors Had a Policy of Terminating Distributorships Whenever It Became More Profitable to Do So.*

In answer to question No. 4, the jury found that as of November 9, 1951, General Motors had a policy of termi-

nating distributorships.[33] The evidence clearly indicates that even prior to that date General Motors had formulated a policy which contemplated the eventual elimination by Buick of all of its distributors after they had helped to build up Buick's position in their area to a point where Buick felt it could carry on without their services. The origin of that policy, as revealed by the testimony and correspondence of Curtice, Hufstader and others, dated back to the pre-World War II period.

Thus, General Motors' president Harlow H. Curtice testified that during the years immediately preceding World War II (1937-1941), he and Hufstader, then General Sales Manager of Buick, discussed the matter of substituting factory zone operations in place of private distributorships on numerous occasions. Commencing in 1937 or 1938, various studies and surveys were made at the instance of Curtice and Hufstader, comparing the cost of private distributorships with the estimated cost of direct factory distribution. Curtice testified that actually such studies were not essential in view of the fact that both Curtice and Hufstader knew all along that as production and sales increased, Buick would replace its private distributors with direct factory zone operations. Hufstader and Belfie testified substantailly to the same effect.

We have already reviewed the manner in which Buick methodically set about to execute this policy of eliminating

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[33]In answer to questions number 3 and 5, the jury found that General Motors did not have such a policy during the periods 1941 to 1952 or 1937 to 1941. Apparently the jury was of the view that General Motors' policy originated with the termination of the Howard distributorship in the mid-1940s. However, for purposes of the present appeal, it is not necessary to determine the precise date on which the policy was formulated, for the existence of the policy on November 9, 1951 is itself sufficient to sustain Anderson's claim in view of the substantial expenses (notably the $500,000 mortgage loan) he incurred subsequent to that date, as a result of his ignorance of General Motors' policy.

its "partners in progress" as soon as it became profitable to do so—the elimination of Noyes in 1944; the elimination of Howard in 1947; and the elimination of the Northwest distributors, including Anderson, in 1953. (See pp. 25-26, *supra*.)

In short, it is clear that General Motors had a long-range policy of eliminating distributorships as soon as it became more profitable to do so, and that the elimination of Anderson was merely one step in the execution of that policy.

2. *General Motors Had a Duty to Disclose That Policy to Anderson.*

In answer to question No. 7, the jury found that General Motors did not have a duty to disclose the aforesaid policy to Anderson, this being the sole "missing link" in Anderson's claim in the view of the jury, as reflected in its answers to the special questions submitted to it. It should be noted that this finding of the jury is directly contrary to the testimony of General Motors' own officials concerning the existence of a duty to disclose in the exercise of the obligation of good faith. (See pp. 20-21, *supra*.)

In subsequent portions of this brief, we shall demonstrate that this issue should never have been submitted to the jury at all, but that the Court should have instructed the jury, in accordance with Anderson's request, that General Motors had a duty, as a matter of law, to disclose its Distributorship Termination Policy to Anderson.

3. *General Motors Failed to Disclose That Policy to Anderson.*

In answer to question No. 8, the jury found that Anderson had no knowledge of General Motors' Distributorship Termination Policy, and the evidence is clearly in

accord. Thus, Anderson's own testimony that General Motors' policy was never disclosed to him was corroborated by the testimony of several General Motors officials, each of whom stated that General Motors' Distributorship Termination Policy was never disclosed to Anderson until long after Anderson's distributorship had been terminated.

4. *Anderson Was Not Chargeable With Knowledge of That Policy Independently of Any Disclosure by General Motors.*

In answer to question No. 8, the jury found that Anderson did not know of General Motors' Distributorship Termination Policy and could not have known of that policy in the exercise of ordinary business prudence. This is entirely in accord with the evidence, which contains no suggestion that Anderson had any knowledge of General Motors' Distributorship Termination Policy prior to October, 1953. Indeed, since the existence of the Policy was known only to certain responsible officials in the General Motors organization, who admittedly never revealed the policy to Anderson, it is clear that Anderson could not be charged with knowledge of its existence.

5. *Anderson Suffered Damage Attributable to Such Non-disclosure.*

While it is not necessary for purposes of the present appeal to determine the precise amount of damages Anderson sustained by virtue of General Motors' non-disclosure, it is clear that he did sustain substantial losses as a result of General Motors' failure to disclose its Distributorship Termination Policy. Thus, in November, 1951, Anderson incurred a mortgage loan of $500,000 in reliance upon his belief, fostered by General Motors, that his distributorship would not be terminated as long as he per-

formed satisfactorily. Moreover, Anderson testified that he would not have invested hundreds of thousands of dollars in acquiring and improving his facilities, had he known that Buick planned to terminate his distributorship before his investments could bear fruit.

It is true that the jury gave a negative answer to question No. 9a, which stated:

> "Did Anderson Buick Company take action in ignorance of a matter which General Motors was required to disclose to Anderson Buick Company because of the relationship between Anderson Buick Company and General Motors?" [Tr. Vol. VI, p. 2462.]

However, in light of the jury's other answers, as heretofore summarized, it is clear that the jury's negative answer to this question flowed from the fact that an affirmative response to the question in the form presented to the jury *would have required the jury to have found a duty to disclose,* whereas, in fact the jury failed to find that such a duty existed. Accordingly, this answer in no way serves to negative Anderson's reliance on the non-existence of General Motors' policy. In fact, in the face of the overwhelming and uncontradicted evidence that Anderson did in fact suffer substantial losses as a result of his ignorance of General Motors' Distributorship Termination Policy, a finding of non-reliance by the jury would have been not only unsupportable, but incredible.

> In light of the foregoing, it is clear that *if there was a duty to disclose as a matter of law, the jury's general verdict necessarily would have been in favor of Anderson rather than of General Motors.*

B. There Was a Duty as a Matter of Law on the Part of General Motors to Disclose Its Distributorship Termination Policy to Anderson.

1. *The Clear Trend of Authority Is to Establish a Duty to Disclose Wherever Such Disclosure Is Required in the Interests of Fair Dealing.*

In determining whether a duty to disclose exists, the courts sometimes speak in terms of various specific situations under which a duty to disclose exists. Thus, it has been said that such a duty exists where there is a relation of trust and confidence between the parties (see pp. 58-60, *infra*) or where one party has special means of knowledge not available to the other (see pp. 77-79, *infra*), or where a party has made certain statements which require that the remaining facts be disclosed (see pp. 79-80, *infra*).

Gradually, however, the courts have added to and expanded these categories so as to require, in practical effect, that disclosure be made whenever it is required in the interests of fair dealing.

23 *Am. Jur.* 854, 856;
Keeton, *Fraud—Concealment and Non-Disclosure,* 15 Tex. L. Rev. 1, 12 (1936);
Prosser on Torts, 2d Ed., 532.

Thus, Professor Keeton, in the classic and oft-cited article in this field, observes (15 Tex. L. Rev. 31):

> ". . . When Lord Cairns stated in Peek v. Gurney that there was no duty to disclose facts, however morally censurable their non-disclosure may be, he was stating the law as shaped by an individualistic philosophy based upon freedom of contract. It was not concerned with morals. In the present stage of the law, the decisions show a drawing away from this idea, . . .

> The attitude of the courts toward non-disclosure is undergoing a change and contrary to Lord Cairns' famous remark it would seem that the object of the law in these cases should be to impose on parties to the transaction a duty to speak whenever justice, equity, and fair dealing demand it. This statement is made only with reference to instances where the party to be charged is an actor in the transaction. This duty to speak does not result from an implied representation by silence, but exists because a refusal to speak constitutes unfair conduct. . . ."

Again, Dean Prosser comments (*Prosser on Torts,* 2d Ed. 535):

> ". . . The law appears to be working toward the ultimate conclusion that full disclosure of all material facts must be made whenever elementary fair conduct demands it."

Even where the parties are dealing at arm's length, it is now recognized that there is a duty to disclose certain material facts known only to one of the parties.

See, *e. g.,*

Perkins v. Marsh, 179 Wash. 362, 37 P. 2d 689 (1934) (Duty of lessors to inform lessees of certain defects in the premises);

Kaze v. Compton, 283 S. W. 2d 204 (C. A. Ky., 1955) (Damages for deceit based on non-disclosure that a drain tile ran beneath the house).

The decisions of the Supreme Court of Washington are in accord with this trend.

Thus, in *Ikeda v. Curtis, supra,* involving an action for fraud in the sale of a hotel property based on the seller's failure to reveal that the hotel's income was de-

rived largely from prostitution, the court states (261 P. 2d 691):

> "We held in Perkins v. Marsh, 179 Wash. 362, 37 P. 2d 689, 690, that, under certain circumstances, there is a duty to disclose a material fact even where there was no fiduciary relationship, . . .
>
> . . .
>
> "In the case at bar there was no misrepresentation as to the *amount* of the income. The court correctly found that the *amount* of the income was larger than that represented by appellant. The only representation as to the *source* of the income was that it came from permanent and transient guests. Nothing was said or shown to respondents which would put them on notice concerning the source of the income. They were buying the good will, furniture and equipment of the hotel. They naturally felt that they were buying a legitimate business. Appellant deceived them to their damage, by failing to reveal the source of the income. Under the peculiar circumstances of this case, it was the duty of appellant to reveal the source of her income to respondents."

And see:

> *Perkins v. Marsh, supra,* 179 Wash. 362, 37 P. 2d 689.

2. *Ordinarily the Question Whether a Duty to Disclose Exists in a Given Case Should Be Determined by the Court as a Matter of Law.*

> Keeton, *Fraud—Concealment and Non-Disclosure, supra,* 15 Tex. L. Rev. 1.

Professor Keeton, a leading scholar in the field, observes (15 Tex. L. Rev. 39-40):

> ". . . The standard devised in this paper for the purpose of determining when a duty of disclosure ex-

ists, was worked out on analogy to the standard of due care under the same circumstances in the field of negligence. The application of the negligence standard is, in doubtful cases, intrusted to the jury; so for convenience in leading up to the problem of non-disclosure it was assumed that the same method of application would be employed. However, there are numerous other examples of standards, some of which are applied by the judges themselves, without the assistance of a jury. As examples, one might cite the standard of fair conduct of a fiduciary in equity. The standard of reasonableness in the law as to restraint of trade, the standard of due process of law in passing on the validity of legislation under the Fourteenth Amendment, and the standard of want of probable cause in the tort action of malicious prosecution. So an important practical question of application of this new standard is presented. The application of standards calls for common sense or the average moral judgment rather than deductive logic, and for this reason some might think that in doubtful cases its application should be left to the jury. However, one of the chief advantages of law is that it gives the magistrate the benefit of all the experience of his predecessors. Take the decisions as to what is fair conduct in a fiduciary. When a judge examines the decisions for the purpose of determining what is fair and what is not fair, while he may be unable to get a rule he can still get a very fair notion of what experience has shown that a fiduciary has been permitted to do and what a fiduciary ought not to do. In fact, it is believed that he can get a far better estimate of this than a jury can acquire through instructions by the trial judge as to the factors to be considered. Moreover, the trial judges would be greatly hindered in many jurisdictions in view of a prejudice against permitting judges to comment on

> the evidence. On the whole it would seem that this problem of non-disclosure should be one for the court to pass upon in all cases."

Moreover, the question whether a duty to disclose exists in a given case is in general a consequence which the law imposes by virtue of the particular relationship existing between the parties. For example, a principal has a duty of disclosure to his agent arising out of the relationship between the parties (see pp. 61-63, *infra*). Likewise, one partner has a duty to disclose material matters to another partner by virtue of the fiduciary relationship existing between them (see pp. 70-71, *infra*).

It is clear, therefore, that a duty to disclose is not an obligation voluntarily undertaken by a party, but is instead an obligation which the law fastens upon a party as a result of the particular relationship he bears to the party to whom the duty is owing. Accordingly, there is no occasion to submit to the jury the question whether a duty to disclose exists in a particular case; rather, it is for the Court to determine whether the relationship existing between the parties is such that the law will impose a duty to disclose as an inevitable consequence thereof.

In subsequent portions of this brief, we shall demonstrate that such a relationship existed in the instant case. For present purposes, however, we merely wish to emphasize the trial court's error in failing to determine for itself whether General Motors was under a duty to disclose its Distributorship Termination Policy to Anderson.

3. *The Relationship in the Instant Case Between Anderson and General Motors Was Such That There Was a Duty to Disclose as a Matter of Law.*

In the preceding section we noted that the leading authority in the field declares that the question whether there is a duty to disclose should be determined by the Court as a matter of law. While we are fully in accord with his views, we submit that even if it be assumed that such a question might be submitted to the jury in a proper case, in the instant case the obligation to disclose was so clear, by virtue of the nature of General Motors' relationship to Anderson as established by the uncontradicted facts and the testimony of defendant's own witnesses, that this matter should have been determined by the Court in Anderson's favor.

In order to demonstrate that this is in fact the case, we shall review briefly the various factors which the courts have considered in determining whether a duty to disclose exists. Each of these factors in itself has been held sufficient to impose a duty of disclosure. We submit that their cumulative effect in the instant case establishes a duty to disclose as a matter of law even under a standard much less exacting than the "fair conduct" standard toward which the courts have tended.

(a) General Motors Occupied a Confidential Relationship to Anderson.

It is well-established that a duty to disclose exists between parties occupying a confidential relationship.[34]

23 *Am. Jur.* 858-860;
Restatement of Torts, Sec. 551.

Thus, *Restatement of Torts,* Section 551, states:

"(2) One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated

"(a) such matters as the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them."

In applying the foregoing rule, the courts have given the term "confidential relationship" a broad interpretation.

Steiber v. Vanderlip, 136 Neb. 862, 287 N. W. 773 (1939);

Wilson v. Rentie, 124 Okla. 37, 254 Pac. 64 (1926);

Voellmeck v. Harding, 166 Wash. 93, 6 P. 2d 373 (1931);

Klika v. Albert Wenzlick Real Estate Co., 150 S. W. 2d 18 (1941);

Selle v. Wrigley, 233 Mo. App. 43, 116 S. W. 2d 217 (1938).

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[34]"The following relations among others have been held confidential so as to impose a duty to reveal all facts material to the transaction involved: Attorney and client, officers of a corporation and stockholders, joint purchasers, joint owners selling the jointly owned property, partner and copartner, persons under contract to marry, physician and patient, priest and parishioner, principal and agent, and trustee and cestui que trust. Disclosure of all material facts is likewise required of a person making contracts of insurance. . . ."

37 C. J. S., pp. 248-249.

In *Selle v. Wrigley, supra,* the court states (116 S. W. 2d 221):

> "A confidential relationship may be said to exist where two persons stand in such a relation as that, while it continues, confidence is necessarily reposed by one and the influence which naturally grows out of that confidence is possessed by the other. Martin v. Baker, 135 Mo. 495, 36 S. W. 369. The principle is thus stated in 27 American and English Encyclopaedia of Law, 460, 461: 'The origin of the confidence and source of the influence are immaterial. The rule embraces both technical fiduciary relations and those information relations that exist whenever one trusts in and relies upon another. The only question is, does such a relation in fact exist?'
>
> ". . .
>
> "It may therefore be said that a confidential relation exists between two persons, whether their relations be such as are technically fiduciary or merely informal, whenever one trusts in and relies on the other. The question in such case is always whether or not trust is reposed."

In *Wilson v. Rentie, supra,* the court, in holding that one who had acted as a business adviser, though not an attorney, occupied a confidential relationship toward those whom he advised, stated that such relationship includes

> "any relation existing between parties, wherein one of the parties is in duty bound to act with the utmost good faith for the benefit of the other party, and includes legal and all other relationships where confidence is rightfully reposed. . . ." (254 Pac. 66.)

Again, in *Steiber v. Vanderlip, supra,* the court states (136 Neb. 868):

> ". . . The rule as to confidential or fiduciary relations applies to any transaction or situation of advantage, in which confidence is rightfully reposed on one side and a resulting superiority and opportunity for influence is thereby created on the other. . . ."

In *Voellmeck v. Harding, supra,* the Supreme Court of Washington states (6 P. 2d 376):

> " 'A good deal has been said as to what constitutes a confidential relation, within the operation of the principle, but courts have always been careful not to fetter the operation of the principle by undertaking to define its precise limits. The cases of parent and child, guardian and ward, trustee and cestui que trust, principal and agent, are familiar instances in which the principle applies in its strictest sense. But its operation is not confined to the dealings and transactions between parties standing in these relations, but extends to all relations in which confidence is reposed, and in which dominion and influence resulting from such confidence may be exercised by one person over another. No part of the jurisdiction of the court is more useful, it has been said, than that which it exercises in watching and controlling transactions between parties standing in a relation of confidence to each other; and, being founded on the principle of correcting abuses of confidence, it ought to be applied to every case in which a confidential relation exists as a fact,—where confidence is reposed on the one side, and the resulting superiority and influence on the other. . . ."

Applying the foregoing standard to the instant case, it is clear that a confidential relationship as that term is un-

derstood in the law of fraud existed between General Motors and Anderson during the term of Anderson's distributorship.

> *First of all, the relationship between a distributor and a manufacturer is generally recognized as imposing upon each party an obligation to deal with the other in good faith, including a duty to disclose facts material to the distributorship.*

See:

> *Smyth Sales, Inc. v. Petroleum Heat & Power Co.,* 128 F. 2d 697, *infra,* pp. 67-68.

This follows in part, of course, from the fact that the distributor is an agent of the manufacturer, which, as his principal, occupies a fiduciary relationship toward him.

It Is Well Established, of Course, That a Principal and Agent Have a Duty to Each Other to Make a Full Disclosure as to All Matters Material to the Agency.

> *Twohig,* 224 F. 2d 493, 497 (C. A. 8, 1955).)

See, *e. g.,*

> *Kruse v. Miller,* 143 Cal. App. 2d 656, 300 P. 2d 855 (1956);
>
> *Restatement of Agency,* Second, Sec. 435.

Thus, in *Kruse v. Miller, supra,* the court held that an agent violated his duty to his principals by not informing them of certain representations he had made in connection with a sale of certain property in their behalf.

It has been recognized that the fiduciary relation between principal and agent is not a "one-way street," *i. e.,* that the principal owes fiduciary obligations to his agent,

including a duty to make full disclosure of facts material to the agency.

Walter v. Libby, 72 Cal. App. 2d 138, 164 P. 2d 21 (1945);

McLeod v. Gaither, 94 Fla. 55, 113 So. 687 (1927);

Louis Schlesinger Co. v. Wilson, 22 N. J. 576, 127 A. 2d 13 (1956);

Restatement of Agency, Second, Sec. 435.

Thus, *Restatement of Agency,* Section 435, states:

"Unless otherwise agreed, it is inferred that a principal contracts to use care to inform the agent of risks of physical harm or pecuniary loss which, as the principal has reason to know, exist in the performance of authorized acts and which he has reason to know are unknown to the agent. . . ."

Again, in *McLeod v. Gaither, supra,* the court states (113 S. W. 687, 688):

"In Porte F. Quinn et al. v. John S. Phipps, 113 So. 419, decided last term (April 11, 1927), this court at some length announced the law in this state governing the conduct and fidelity of a real estate broker to his principal. In this case we have the reverse situation so the main question presented concerns the degree of good faith due on the part of a principal to both his co-principal and his broker. . . .

". . .

". . . The doctrine of Quinn et al. v. Phipps is equally as binding on the principal when dealing with his coprincipal or broker as it is on the broker when dealing with his principal. Both are required to deal squarely and in good faith. . . ."

In *Louis Schlesinger Co. v. Wilson, supra,* the court held that where plaintiff undertook to procure a purchaser for certain land belonging to defendant in return for a specified commission, defendant was under a duty as a matter of law to disclose to plaintiff the fact that he had previously granted an option of purchase on the same land to a third party, explaining (22 N. J. 585, 586):

> ". . . The charge is not made to enforce the contents of the oral agreement but to compensate the plaintiff for its loss engendered by the deceit. Nanos v. Harrison, 97 Conn. 529, 117 A. 803 (Sup. Ct. Err. 1922). The confidence arising from a principal-agent relationship is not charted on a one-way street. Good faith works in both directions. . . ."
>
> ". . . Clearly it was defendant's duty to inform plaintiff of the option agreement which was executed prior to the oral understanding. Cf. Restatement, Agency, sec. 435 (1933), and note especially comment (c); Romine v. Green, 13 N. J. Super. 261 (App. Div. 1951). That duty was not fulfilled. . . ."

It is well recognized that the relationship of a manufacturer to a distributor includes that of principal and agent.

See, *e. g.,*

Champion Spark Plug Co. v. Automobile Sundries Co., 273 Fed. 74 (C. C. A. 2, 1921);

Pugh v. A. D. Bothne Co., 178 Ia. 601, 159 N. W. 1030 (1916);

John v. Baltimore & O. R. Co., 118 Fed. Supp. 317, 328 (N. D. Ill., 1954) (Remanded on other grounds in *Lawrence Warehouse Company v. Twohig,* 224 F. 2d 493, 497 (C. A. 8, 1955)).

Thus, in *Champion Spark Plug Co. v. Automobile Sundries Co., supra,* the court held that a distributorship contract created the relationship of principal and agent, in addition to that of buyer and seller, and that "it was therefore important to have the jury understand the requirement of complete fidelity, which was owing by the agent to its principal, and which the defendant had the right to expect, . . ." (273 Fed. 77).

Again, in *Pugh v. A. D. Bothne Co., supra,* the court, in holding that an automobile dealer was an agent of the automobile manufacturer, states (159 N. W. 1031):

> "It will be noted from this contract that it contemplates the purchase of cars from time to time by the dealer from the manufacturer. . . . There is no necessary antagonism between the relation of purchaser and seller and that of principal and agent. An agent may buy from his principal, and yet maintain in other respects the relation of an agent. In this case, although the dealer agreed to purchase, he did so for the purpose of a resale. He was not a purchasing customer in the ordinary sense. The ultimate customer for the vehicle was to be found by the dealer. The dealer was not even purchasing at wholesale in the ordinary sense. He was not in the market buying automobiles in quantities where he could buy the best. The foregoing contract contains 21 specifications. Comparatively few of them deal with the relation of purchaser and seller. If no other relation than that of purchaser and seller was contemplated, then many of the provisions of the contract are not only unnecessary, but are impertinent. The dealer binds himself therein to certain conduct in the handling of the product of the manufacturer even after its purchase. He undertook to furnish a place for the exhibition of the product of the manufacturer. He receives its lit-

erature and distributes its advertising. He delivers its printed warranties to his retail customers. He is entitled to the benefit of the advertising of the manufacturer, and the manufacturer is entitled to the benefit of his diligence in pushing sales to the end that the business of the manufacturer as well as that of the dealer may be increased. All these matters are fairly within the contemplation of the contract. . . ."

The essential attributes of the principal-agent relationship, as set forth in *Pugh v. A. D. Bothne Co., supra,* are likewise found in the instant case. Here, too, the distributorship contract is devoted essentially to various facets of the principal-agency relationship between the parties. Thus, Anderson, like the dealer in the *Pugh* case, binds himself to the handling of the product of the manufacturer after its purchase [Tr. Vol. I, pp. 74-77]. Here, too, Anderson undertook to furnish a place for exhibition of the product of the manufacturer [Tr. Vol. I, p. 70] and the manufacturer is entitled to the benefit of Anderson's diligence to the end that the business of the manufacturer, as well as that of the distributor, may be increased [Tr. Vol. I, pp. 72-73].

In short, the elements which existed in the *Pugh* case are likewise present in the instant case, and it seems equally clear that the relationship between General Motors and Anderson included that of principal and agent. This principal-agency aspect of the distributorship relation would, of course, create a duty of disclosure on the part of the manufacturer-principal to his distributor-agent under the authorities heretofore cited.

But regardless how the distributorship relationship is classified, however, *the courts have recognized that such*

a relationship imposes upon each party an obligation to deal with the other in good faith.

Smyth Sales, Inc. v. Petroleum Heat & Power Co., 128 F. 2d 697 (C. C. A. 3, 1942);

E. H. Taylor, Jr. & Sons v. Julius Levin Co., 274 Fed. 275 (C. C. A. 6, 1921).

Illustrative of the decisions in this area is *E. H. Taylor, Jr., & Sons v. Julius Levin Co., supra,* where the court comments as follows with respect to a liquor distributorship (274 Fed. 278, 279, 282):

> "From the beginning of the controversy, Taylor contended that the contract with Levin was substantially one of agency, while Levin has insisted that the relations between them were those of vendor and vendee. It seems to have been thought that one or the other label must be applied, and that, when the contract had been thus classified, the legal rules applicable to the rejected theory would be eliminated from any application. We do not thus view the situation. We are content, so far as concerns the title to the whisky for which notes had been given, to accept and approve the findings below to the effect that this whisky had been set aside, appropriated, and paid for by the giving of the notes, and had become the absolute property of Levin, subject to the pledge evidenced by the warehouse receipts to secure the unpaid purchase price. In this respect, there was no agency; but this covers only part of the contract relations. The sharing of the Levin advertising expenses, the arrangement by which Taylor not only would sell to no one else in the Levin Territory, but would, as far as possible, compel all Eastern purchasers or jobbers of Old Taylor to keep out of it, the plan by which they used their joint credit to finance the deals over a continuing four-year period—all these elements of the

arrangement constantly continued to be executory, and, though they did not necessarily evidence an agency in the strict sense of that term, they did show that the parties were engaged in a continuing, executory, joint adventure, to which each was to contribute his share for the common good. . . ."

". . .

"It is not material whether the name 'agency' be adopted or repudiated, and when we hereafter speak of this exclusive agency, we intend the actual relationship, without regard to strict nomenclature; . . .

". . .

". . . In the present contract, as to its executory portions, the continuing dependence of each upon the integrity and faithfulness of the other necessarily subjects it to the same rules in the respect now under consideration as are applied to strict contracts of agency."

Smyth Sales, Inc. v. Petroleum Heat & Power Co., supra, involved an action for fraud and deceit by a distributor of fuel oil for failure to disclose the commissions due on certain sales. In holding such non-disclosure actionable, the court stated (128 F. 2d 700-701):

". . . we are prepared to predicate liability on the theory that the defendant was under a duty, arising out of the relation of the parties as a result of their contract, to disclose the commissions due the plaintiff on the 'Electrol' sales.

"Exclusive sales agreements have been variously construed as creating an agency or a buyer and seller relationship. In most of the cases found there was not the relation of principal and agent in the ordinary sense of that term but the grant by a distributor (who was a manufacturer or wholesaler) to a distributee (a wholesaler or retailer) of an exclusive right to

sell products of the former. This is the situation in the case at bar. However, the resultant relationship is not totally devoid of attributes which the law imposes upon parties in the relation of principal and agent. In other words the duties of mutual trust, confidence and loyalty so far as the subject matter of their dealing are concerned are applied to the parties to an exclusive sales transaction. The parties are not, as ordinary vendor and vendee, dealing at arm's length. They have, of their own accord, agreed to conform to a peculiar but mutually advantageous arrangement. We believe that this relationship requires full disclosure by the parties of all facts pertinent to the exclusive sales provision, and that the decisions cited above support this view of the relation."

In light of the foregoing authorities, it is clear that General Motors occupied a confidential relationship to Anderson under which it was required to disclose to Anderson all matters material to the distributorship.

However, it is not necessary to rely solely upon the rules governing the relationship between a manufacturer and distributor in general, because

it is clear that the particular relationship with which we are here concerned was such as to impose upon General Motors, as a matter of law, a duty to make full disclosure to Anderson of General Motors' Distributorship Termination Policy.

1. *Partners in Progress.*

The testimony of responsible General Motors' officials —several of whom acknowledged their close personal friendship with Anderson—establishes beyond question the closeness of the relationship which existed between General Motors and Anderson during the period of Anderson's distributorship.

Thus, Harlow Curtice, General Motors' president and former Buick General Manager, described the relationship as one of "partners in progress," and again as a partnership "in a business sense." According to Curtice, the relationship between General Motors on the one hand and its dealers and distributors on the other, is a "continuing personal relationship," a "close relationship," a "mutually helpful relationship," and one which is "interdependent." In fact, Curtice testified that "there is no business in which the relationship is so interdependent."

William Hufstader, General Motors' vice president and former general sales manager of Buick, likewise testified that an unusual mutuality exists between the automobile manufacturer and his dealers and distributors.

During his "partnership" with Buick, Anderson devoted his time, efforts and financial resources for some 17 years in carrying out Buick's program in the Pacific Northwest and building up good will for Buick's product. His success in taking over an anemic distributorship and building it up to a position where it ranked third in the nation was recognized by General Motors' own officials.

But the obligations flowing from General Motors' "partnership in progress" with Anderson were not a "one-way street," for General Motors on its part owed Anderson an obligation to treat him fairly and to deal with him in good faith. Indeed, General Motors' president Harlow Curtice conceded that General Motors was under an obligation to act in good faith toward Anderson, while William Hufstader, General Motors' Vice President and former Buick Sales Manager, testified that good faith is the essence of a successful franchise relationship. Moreover, Hufstader expressly declared that by virtue of General Motors' obligation

to deal fairly with its distributors, *General Motors was bound to notify a distributor such as Anderson of all matters which might affect the latter's welfare in connection with the performance of his distributorship.*[35]

In light of the "partners in progress" relationship which existed between General Motors and Anderson, it is clear that General Motors owed Anderson certain duties which flow as a matter of law from such a relationship. Among those duties is the duty to make full disclosure as to all material matters respecting the subject matter of the joint enterprise peculiarly within the knowledge of one of the parties. The existence of such a duty presents no fact question for a jury. Rather, it is an obligation which the law imposes by the very nature of a "partners in progress" relationship, which in its fiduciary aspects is closely akin to a partnership in law.

> *Cf., Smyth Sales, Inc. v. Petroleum Heat & Power Co.,* 128 F. 2d 700, discussed pp. 67-68, *supra.*

As with a partnership relation in the conventional sense, "the status of the parties being thus fixed, the law applying is, of course, well settled."

> *Galbraith v. Devlin,* 85 Wash. 482, 148 Pac. 589 (1915);
>
> *Cf., Kittilsby v. Vevelstad,* 103 Wash. 126, 173 Pac. 744 (1918);
>
> *Karle v. Seder,* 35 Wash. 542, 214 P. 2d 684 (1950).

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[35]Hufstader testified that

> "any relationship entered into in good faith has to have a mutuality of understanding, objective, and if it be to the interests of either party that plans be discussed that require the thoughtful application of both, then as a matter of good faith I should think that it would be necessary and incumbent upon both parties to discuss it on the basis of mutuality of interest" [Hufstader Dep. p. 414].

Thus, in *Karle v. Seder, supra,* the court held that the mere fact that the personal relation between the partners may be strained in a given case, does not alter the fiduciary relationship existing between them, or the obligations arising therefrom.

Accordingly, it was error for the trial court to permit the jury to determine whether General Motors owed such an obligation of disclosure to its partner in progress, Anderson. Rather, the Court should have instructed the jury, as requested by plaintiff, that *such a duty was owing by General Motors to Anderson as a matter of law.*

2. *Control of Anderson by General Motors.*

Not only was the relationship between Anderson and General Motors an extremely close one, but it was also a relationship in which the parties were not on an equal footing. On the contrary, General Motors completely dominated and controlled Anderson.

Before commenting on the facts of the instant case, it should be noted that the position of dominance and control which General Motors occupies toward its dealers has been recognized both by the courts and by Congress.

See, *e. g.,*

United States v. General Motors Corp., 121 F. 2d 376 (C. C. A. 7, 1941);

House Report No. 2850, 84th Congress, 2nd Sess. (1956), U. S. Code. Cong. and Admin. News, pp. 4596-4609;

United States Congress Senate, Antitrust Laws Study (1956).

Thus, in *United States v. General Motors Corp., supra,* involving a prosecution for conspiracy to restrain trade

by compelling General Motors dealers to finance their automobiles through GMAC upon threat of cancelling their dealership contracts, the court comments as follows with respect to General Motors' relationship *vis-a-vis* its dealers (121 F. 2d 386-387):

> ". . . General Motors automobiles are sold through some 15,000 dealer outlets located in every state in the country. . . . All dealers operate under written franchise agreements entered into with GMSC, and they are required to have a substantial investment in buildings, parts, accessories and signs, and to provide ample space and personnel for the sale and servicing of cars. . . .
>
> "The franchise contracts recite that they shall continue in force 'until cancelled or terminated,' but in practice it is customary to 'renew' them each time a new model is introduced. . . . The dealers are required to keep a uniform accounting system, to permit audits of accounts and records by GMSC, and to furnish GMSC with certain estimates and reports, namely, an annual estimate, a monthly estimate, and a 10-day report. The annual estimate states in advance of retail orders what the dealer's anticipated car needs by months for the coming calendar year will be. The monthly estimate states in advance of retail orders what the anticipated requirements for the following three months will be. The 10-day report shows retail sales of both new and used cars made during the period, new and used car stock, and unfilled retail orders on hand at the end of the period. . . .
>
> "It also appears that dealers are required to submit 30-day reports and monthly financial statements. The 30-day reports show the number of used cars junked or sold at retail, the number of new cars sold

at retail for cash, and the number of new and used cars sold on time. The monthly financial statements cover operations for the preceding month and show the actual condition of the business. The 10-day reports, the 30-day reports and the financial statements are mailed to or otherwise received by the zone manager of the proper motorcar unit of GMSC. The data contained in these reports and statements are compiled and forwarded to the regional manager, who in turn makes a similar composite compilation pertaining to his territory and sends it to the General Sales Manager. All this data and information is consolidated, and in due time the final product represents a national picture on dealers' operations, a document of value to the central office of GMSC."

Recent findings of Congressional Committees as to the nature of General Motors' relationship to its dealers are to the same effect. For the convenience of the Court we have set forth pertinent extracts from those findings as Appendix A to this brief.

The foregoing observations are amply demonstrated by the facts of the instant case. We have already reviewed at length the manner in which General Motors dominated and controlled Anderson. (See pp. 4-18, 21-22, *supra.*) Thus, General Motors required Anderson to consult with his General Motors superiors before taking any action of consequence in connection with his distributorship.

Likewise, Anderson's superiors in General Motors made periodic inspections of his facilities in the course of which they reviewed every phase of Anderson's operation. Another control device employed by General Motors was its practice of requiring that Anderson furnish his superiors in the Buick organization with frequent reports on all

phases of his operations, such as inventories, physical facilities and financial condition.

Such personal contacts and individual reports were supplemented by meetings at which Anderson and other Buick distributors were told by General Motors' officials how their operations were to be conducted. Still another means of securing conformity included a zone manual prepared by General Motors with which Anderson was required to comply, as well as General Motors' requirement that Anderson employ a standardized accounting system devised by General Motors.

The information thus gleaned by General Motors was tabulated and analyzed in order to determine whether Anderson was carrying out the policies laid down by General Motors. Any deviation from the norm would, of course, be called to Anderson's attention and such pressure as might be required would be exerted upon Anderson to secure compliance with General Motors' wishes.

It was in this manner that General Motors compelled Anderson to increase his working capital, in accordance with General Motors' master plan, although Anderson himself did not consider such an increase necessary. Such methods were likewise employed to induce Anderson to make substantial investments in physical facilities until they reached the point where General Motors itself regarded the Anderson enterprise as "magnificently housed."

At times General Motors' control over Anderson assumed the guise of "friendly persuasion," but sterner tactics were employed when necessary, as when Buick's General Sales Manager Hufstader summoned Anderson to Flint and bluntly ordered him not to seek the presidency of the 30,000-member National Automobile Dealers Association.

From time to time, General Motors' control over Anderson became even more open and direct. Thus, from 1936 to 1940 and from 1942 to 1945, General Motors took direct control over Anderson through its Motors Holding Company subsidiary and, through minutes prepared in the offices of Motors Holding, formulated many of Anderson's permanent business policies for him.

The effectiveness of General Motors' tight control over Anderson is evidenced by the fact that the written dealership agreements under which Anderson operated were not negotiated by the parties, but were prepared unilaterally by General Motors, which would periodically herd Anderson and its other distributors together and pass out a printed form of agreement which General Motors had prepared for their signatures.

Such passive submission on the part of Anderson is hardly surprising in view of the relative economic positions of General Motors—the nation's largest corporation —and Anderson, one of Buick's three thousand or more dealers and distributors. The termination by Anderson of his relationship with Buick would hardly have created a ripple in General Motors' vast empire, whereas General Motors' severance of its relations with Anderson would, and in fact did, result in financial ruin to Anderson. In short, the relationship of General Motors to Anderson was one of complete domination and control.

The existence of such a position of dominance has been relied upon time and again as establishing a relationship of trust and confidence.

See, *e. g.,*

Selle v. Wrigley, supra, 233 Mo. App. 43, 116 S. W. 2d 217.

Thus, in *Selle v. Wrigley, supra,* the court, in holding that defendant occupied a confidential relationship to plaintiff, pointed out (116 S. W. 2d 221):

> ". . . that the defendant at once assumed authority over him and set himself up as the plaintiff's friend, adviser, and protector, assuming the place of a parent to him. He put him to work and directed his movements from day to day. By his attitude, his conduct, and his authority exercised, he readily obtained an influence over the plaintiff and naturally led him to repose confidence and trust in him."

The same observations might well be made with respect to General Motors' relationship to Anderson.

In light of the extensive control which General Motors exercised over Anderson's operations, and of Anderson's dependence upon General Motors, it is not surprising to find that Anderson was required to obtain approval from responsible General Motors officials before undertaking any business venture. For example, whenever Anderson was considering the acquisition of new facilities, the disposition of existing facilities, or any other business decision, he was required to clear the project with General Motors (see pp. 4-6, *supra*).

As a corollary of General Motors' domination and control over Anderson, and the resulting trust and confidence which Anderson reposed in his General Motors superiors, *General Motors had a duty as a matter of law to disclose to Anderson all matters of importance affecting his distributorship.* (In fact, Anderson's superiors in the General Motors organization appeared to recognize their obligation in this regard, although they did not fulfill it with respect to the matter at issue (see pp. 20-21, *supra*).)

Nevertheless, when Anderson's superiors in General Motors had formulated a policy under which they planned to eliminate Anderson's distributorship as soon as it became more profitable to do so, they failed to disclose this fact to Anderson, but instead encouraged him to invest substantial sums in his distributorship, from which they knew he would never have an opportunity to reap the harvest to which he was entitled.

3. *Superior Knowledge of General Motors.*

Even in the absence of a confidential relationship, the courts have held that there is a duty to disclose facts within the exclusive knowledge of one of the parties, particularly where the other party has no other means of obtaining knowledge of those facts.

Villalon v. Bowen, 70 Nev. 456, 273 P. 2d 409 (1954);

Kuhn v. Gottfried, 103 Cal. App. 2d 80, 229 P. 2d 137 (1951);

Everett v. Gilliland, 47 N. M. 269, 141 P. 2d 326 (1943);

And see,

Oates v. Taylor, supra, 31 Wash. 898, 199 P. 2d 924, 928 (1948);

23 *Am. Jur.* 856, 857;

37 *C. J. S.* 246.

Thus, in *Villalon v. Bowen, supra,* the court states (273 P. 2d 414, 415):

"Yet, even in absence of a fiduciary or confidential relationship and where the parties are dealing at arm's length, an obligation to speak can arise from the existence of material facts peculiarly within the

> knowledge of the party sought to be charged and not within the fair and reasonable reach of the other party. Under such circumstances the general rule is that a deliberate failure to correct an apparent misapprehension or delusion may constitute fraud. This would appear to be particularly so where the false impression deliberately has been created by the party sought to be charged. . . ."

Again in *Kuhn v. Gottfried, supra,* the court observes (229 P. 2d 141):

> ". . . Concealment may constitute actionable fraud where the seller knows of facts which materially affect the desirability of the property which he knows are unknown to the buyer. . . ."

In *Everett v. Gilliland, supra,* the court, in holding that defendant sellers were duty-bound to disclose to plaintiff purchaser all information within their knowledge as to the balance due on a certain mortgage which plaintiff assumed under his agreement, stated (141 P. 2d 330):

> "'. . . There is much authority to the effect that if one party to a contract or transaction has superior knowledge, or knowledge which is not within the fair and reasonable reach of the other party and which he could not discover by the exercise of reasonable diligence, or means of knowledge which are not open to both parties alike, he is under a legal obligation to speak, and his silence constitutes fraud, especially when the other party relies upon him to communicate to him the true state of facts to enable him to judge of the expediency of the bargain.'"

In the instant case, it is clear that the existence of General Motors' policy of distributorship termination was a matter solely within the knowledge of certain General Motors officials, and there was a clear duty on the part

of General Motors as a matter of law to disclose that policy to Anderson. Nevertheless, General Motors' Distributorship Termination Policy was never disclosed to Anderson. Indeed, as pointed out below, Anderson was constantly assured by General Motors' officials of the long-range nature of his distributorship. Even the steps by which General Motors executed its Distributorship Termination Policy—*i.e.,* the elimination of various distributorships throughout the country—were not disclosed to Anderson.[36]

4. *Representations and Promises by General Motors.*

Still a further basis for General Motors' duty to disclose its Distributorship Termination Policy to Anderson lies in the various promises and representations that General Motors made to Anderson.

First of all, as heretofore noted, Jerome Nash, Anderson's immediate superior in the Buick organization, had assured Anderson that he would keep him informed of all matters affecting Andersons' distributorship.

Secondly, various General Motors officials, including Hufstader and Curtice who originally formulated General Motors' policy of terminating distributorships whenever it became more profitable to do so, constantly spoke in terms of the long-range nature of General Motors' dealer and distributorship franchises in general, and Anderson's distributorship in particular.[37]

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[36]Indeed, the jury itself expressly found that Anderson did not and could not reasonably have known of General Motors' Distributorship Termination Policy.

[37]As a further evidence of the long-term nature of Anderson's distributorship, General Motors provided special training courses for Anderson's sons, along with the sons of other dealers and distributors, covering all phases of dealership management.

Furthermore, whenever Anderson evidenced any concern to his superiors regarding a possible termination of his distributorship, his mind was quickly put at rest. Thus, in 1947, when Anderson heard rumors as to the termination of the Howard distributorship and became perturbed about the duration of his own distributorship, he was assured by Jerome Nash, Buick's Pacific Coast regional manager, that the Howard termination was not a matter which need concern Anderson, Nash testifying that he put Anderson's mind "at rest."

It is submitted that under such circumstances General Motors was obligated as a matter of law to disclose its Distributorship Termination Policy to Anderson. The courts have repeatedly recognized that such conduct is in itself sufficient to render the non-disclosure actionable as a matter of law.

Ikeda v. Curtis, 43 Wash. 2d 449, 261 P. 2d 684, 691 (1953);

Kuhn v. Gottfried, supra, 103 Cal. App. 2d 80, 229 P. 2d 137;

Everett v. Gilliland, supra, 47 N. M. 269, 141 P. 2d 326.

Thus, in *Kuhn v. Gottfried, supra,* the court notes (229 P. 2d 141):

> ". . . where one is under no duty to speak, but yet undertakes to do so, either voluntarily or in response to inquiry, he must make a full and fair disclosure and conceal no facts within his knowledge which materially qualify those stated, . . ."

Again, in *Everett v. Gilliland, supra,* the court observes (141 P. 2d 331):

> ". . . The defendant, Charles E. Gilliland, having undertaken to disclose all the facts concerning the mortgage indebtedness, was bound to do so. . . ."

5. *Other Factors.*

In addition to the foregoing factors, Professor Keeton has suggested others which should be taken into account in determining whether a duty to disclose exists. Among these are the nature and materiality of the fact not disclosed, and the type of damage which the person lacking the information is likely to suffer as a result of non-disclosure.

Keeton, *Fraud—Concealment and Non-Disclosure, supra;*

15 Tex. L. Rev. 1,

In the instant case, it is clear that General Motors' policy of distributorship termination was of the utmost materiality to Anderson, for the execution of that policy resulted in Anderson's extinction as a distributor. The damage which Anderson was likely to, and did in fact, suffer as a result of General Motors' failure to disclose that policy is likewise apparent.

Thus, Anderson invested substantial sums in distributorship facilities of a permanent nature and incurred a long-term (15 year) indebtedness of half a million dollars to procure working capital, all in reliance on the assumed long-term nature of his distributorship. It is clear that Anderson would not have made those investments or incurred such indebtedness had he been aware of General Motors' Distributorship Termination Policy. In short, as must have been anticipated, the non-disclosure of General Motors' Distributorship Termination Policy to Anderson led to Anderson's economic ruin.

SPECIFICATION OF ERROR NO. II.

II.

The Court Erred in Refusing to Submit to the Jury Anderson's Claim Based on Nash's 1947 Representations to Anderson.

One of the bases upon which Anderson sought recovery in the trial court was that certain representations were made to Anderson in 1947 by Jerome Nash, Anderson's immediate superior in the Buick organization, to the effect that Anderson's distributorship would not be terminated as long as Anderson rendered satisfactory performance. There was substantial evidence that such representations were made; in fact, Anderson's testimony in this regard was largely corroborated by Nash.

The substance of this testimony is that in 1947 Anderson heard a rumor that the Howard distributorship in California had been terminated, whereupon Anderson phoned Nash in San Francisco, told him he was disturbed by the rumor, and inquired as to its truth. Nash confirmed the truth of the rumor and told Anderson not to be disturbed. Nash emphasized the importance of keeping the matter confidential so as not to disconcert the other Northwest distributors.

Anderson testified that he expressed concern to Nash regarding a projected expansion of Anderson's facilities and that Nash replied that the Howard distributorship was terminated because Howard had not done an adequate job in obtaining market penetration for Buick, but that this did not apply to the Northwest distributors, including Anderson, which were individually owned and well-managed. Anderson testified that Nash assured him that Anderson should go ahead with his program, as there

was nothing to worry about as long as Anderson continued to do a proper job and that he (Anderson) had implicit faith in what Nash told him.

Nash testified that he told Anderson, who appeared perturbed at the Howard termination, "This does not concern you", and that he put Anderson's mind at rest.

Nash subsequently confirmed the telephone conversation by a letter which referred to a forthcoming trip to the West Coast by Hufstader and Curtice, at which time they would meet with the Northwest distributors and discuss their distribution plans for the Pacific Coast region.

In light of the foregoing, it is clear that the evidence was more than sufficient to establish the making of the representations in question. It is equally clear that, assuming such representations were made, they warranted recovery by Anderson on a fraud theory in light of General Motors' subsequent arbitrary termination of Anderson's distributorship in the face of Nash's assurances that the distributorship would be continued as long as Anderson performed properly.

Nevertheless, the trial court ruled as a matter of law that Anderson could not recover on account of the representations, and submitted the case to the jury solely on the basis of the representations made to Anderson in 1951. It is submitted that the Court thereby committed error for which the judgment below should be reversed.

III.

The Written Dealership Contracts Do Not Preclude Recovery by Anderson on a Fraud Theory.

While the written dealership contracts which General Motors prepared and submitted in printed form to Anderson purported to negate any oral representations [Tr. Vol. I, pp. 97-98], it is well-established that parol evidence is nevertheless admissible to establish a basis for recovery on a fraud theory—this on the ground that one cannot obtain contractual immunity for his fraud.

Gronlund v. Andersson, 38 Wash. 2d 60, 227 P. 2d 741 (1951);

Champlin v. Transport Co., 177 Wash. 659, 33 P. 2d 82 (1934);

Producers' Grocery Co. v. Blackwell Motor Co., 123 Wash. 144, 212 Pac. 154 (1923);

Flint v. Owl Land & Investment Co., 122 Wash. 401, 210 Pac. 811 (1922);

Wells v. Walker, 109 Wash. 332, 186 Pac. 857 (1920);

Normile v. Denison, 109 Wash. 205, 186 Pac. 305 (1919);

Bryant v. Troutman, 287 S. W. 2d 918 (C. A. Ky., (1956).

Thus, in *Bryant v. Troutman, supra,* the court held that non-disclosure of facts known to the seller constituted grounds for an action of deceit, despite the following language in the contract of sale (287 S. W. 2d 920):

> " 'We have read the entire contents of this contract and are not relying on verbal statements not contained herein. We further certify that we have examined the property described hereinabove; that we are thoroughly acquainted with its condition and accept it as such.' "

The Washington authorities are clearly in accord with the general rule. As stated in *Flint v. Owl Land & Investment Co., supra* (210 Pac. 813):

> ". . . The rule or doctrine of merger 'is in effect a statement, in different form, of the rule excluding evidence of prior or contemporaneous oral agreements to contradict or modify the written contract, based on the presumption that, *in the absence of accident, fraud or mistake,* the whole agreement of the parties is expressed in the writing.' 13 C.J. p. 797, § 616. But this suit is not upon either the formal real estate contract or the deed nor for a breach of either of them. It is an action for fraud and deceit that led to the purchase represented by the resulting written contract and deed. . . ."

Again, in *Wells v. Walker, supra,* the court states (186 Pac. 858):

> "Errors assigned upon the admission of testimony regarding the alleged false representations, thereby, as it is argued, permitting parol evidence tending to vary the terms of a written contract, which recites that no representations were made other than those contained therein, cannot be sustained here, because, as we have seen, this is an action for rescission of the contract on the ground of fraud. . . ."

In *Producers' Grocery Co. v. Blackwell Motor Co., supra,* the court, in holding that the mere recital in the contract that one of the parties would "not be bound by any understandings, agreements or representations, express or implied, that are not specified herein" does not preclude a showing of fraud, observes (212 Pac. 155):

> ". . . Fraud vitiates everything it touches, and is not merged in the written contract. . . ."

Again, in *Gronlund v. Andersson, supra,* the court states (227 P. 2d 743):

> ". . . where the issue is whether a contract was procured by fraud, the doctrine that parol or other extrinsic evidence is inadmissible to contradict, vary, or explain the terms of a written contract is inapplicable. See Annotation, 56 A.L.R. 13. Parol evidence of false and fraudulent representations including one to enter into a written contract is admissible notwithstanding the contract contains an express recital that there have been no representations, or that all oral representations shall be inoperative. . . ."

Normile v. Denison, supra, involved an action by a former wife to recover one-half of certain community property which, it was alleged, was fraudulently concealed by the husband at the time a property settlement agreement was entered into between them. In holding that certain language in the agreement purporting to protect the husband from such claims did not in fact bar such an action, the court stated (186 Pac. 308):

> "We cannot hold that one may deliberately conceive a plan to defraud, and then in carrying it into execution, by the use of words such as are contained in the fifth paragraph of the second agreement as above quoted, absolve himself from the consequences. . . ."

In light of the foregoing authorities, it is clear that General Motors' liability to Anderson by virtue of its fraudulent non-disclosure is in no way precluded by General Motors' insertion of language in the distributorship contracts purporting to negate any oral representations.

Furthermore, it is clear that the terms of the dealership contracts are not in fact inconsistent with the theory upon which Anderson seeks recovery, namely, that General Motors was duty-bound as a matter of law to disclose to Anderson its secretly formulated policy of terminating Anderson's distributorship as soon as it became more profitable for General Motors to do so.

SPECIFICATION OF ERROR NO. III.

IV.

The Court Erred in Granting Defendant's Motion for a Directed Verdict and Motion to Dismiss Plaintiff's Action Following the Verdict of the Jury.

In view of the fact that the judgment appealed from is based solely upon the verdict rendered by the jury, it is perhaps unnecessary to consider the present Specification of Error since the judgment is not based on the granting of the Motion for a Directed Verdict or the Motion to Dismiss. Nevertheless, as a matter of precaution, the error here involved has been assigned. It is briefly discussed because, in substance, the argument heretofore made in connection with Specification of Error No. I is applicable to this Specification of Error. Thus, as we have heretofore pointed out, in order to recover on a non-disclosure theory it was necessary for Anderson to establish:

1. That General Motors had a policy of terminating distributorships whenever it became more profitable to do so.

2. That General Motors had a duty to disclose that policy to Anderson.

3. That General Motors failed to disclose that policy to Anderson.

4. That Anderson was not chargeable with knowledge of that policy independent of any disclosure by General Motors.

5. That Anderson suffered damage attributable to such non-disclosure (see pp. 45-47, *supra*).

The jury's answers to the special questions submitted to it reveal that aside from the duty to disclose, each of these elements was in fact established by Anderson to the jury's satisfaction. Moreover, the evidence indicates that the jury's determination that those elements were established is amply supported (see pp. 47-51, *supra*).

In granting defendant's motions for directed verdict and to dismiss, the trial court relied primarily upon certain language in the printed form of Distributorship Agreement prepared by General Motors, purporting to exclude representations not embodied in the Agreement. However, as we have heretofore pointed out, it is well-established that such provisions do not preclude a showing of fraudulent non-disclosure, as in the instant case, on the theory that no one may obtain contractual immunity for his own fraud (see pp. 84-87, *supra*). As stated in *Herzog v. Capital Co.*, 27 Cal. 2d 349, 354, 164 P. 2d 8 (1945):

> "A principal under a positive duty to make a disclosure cannot escape liability for failure to do so by relying on a contract provision to the effect that there are no other representations except those contained in the written agreement."

SPECIFICATION OF ERROR NO. IV.

V.

The Court Erred in Instructing the Jury That Anderson Was Precluded From Claiming That He Signed the Distributorship Agreement of November 1, 1952, Because of General Motors' Non-Disclosure of Its Distributorship Termination Policy.

The uncontradicted evidence establishes that Anderson had no knowledge of General Motors Distributorship Termination Policy prior to October, 1953, when he was shown a letter from William Hufstader to an inquiring stockholder in which Mr. Hufstader stated (in substance), that the termination of Anderson's distributorship was merely one step in effecting Buick's long-established policy of eliminating distributorships, including that of Anderson, whenever it became more profitable to do so [Tr. Vol. III, pp. 1070-1073; Pltf. Ex. 82]. Obviously, therefore, Anderson was not aware of this policy at the time he signed the Distributorship Agreement of November 1, 1952.

Nevertheless, the trial court instructed the jury that Anderson was precluded as a matter of law from contending that he signed the agreement of November 1, 1952, because of his ignorance of General Motors' Distributorship Termination Policy. In point of fact, however, it is obvious that Anderson might well have hesitated to enter into any agreement whatever with General Motors had he known of the fraud which General Motors had thus practiced upon him.

Furthermore, as we have heretofore pointed out, the mere execution of the written distributorship agreement of November 1, 1952, does not preclude a showing of fraud (see pp. 84-87, *supra*).

SPECIFICATION OF ERROR NO. V.

VI.

The Court Erred in Awarding General Motors as an Item of Costs Court Reporters' Fees for Preparing a Transcript of the Proceedings at the Trial.

Among the items in General Motors' cost bill was the cost of preparing a transcript of the proceedings at the trial. Anderson filed formal objections to the inclusion of this item, on the ground that the cost of a reporter's transcript is not properly recoverable as costs under either the local court rule or general practice, where, as in the instant case, the transcript is not ordered by the court but is prepared for the benefit of the defendant.

Local Rule 56(g)(4) United States District Court for the Western District of Washington;

See, *e.g.,*

Kemart Corp. v. Printing Arts Research Lab., 232 F. 2d 897 (C. A. 9, 1956);

Marshal v. Southern Pacific Co., 14 F. R. D. 228 (N. D. Cal. 1953);

Department of Highways v. McWilliams Dredging Co., 10 F. R. D. 107 (D. C. La. 1950, aff'd 187 F. 2d 61);

Republic Machine Tool Corp. v. Federal Cartridge Corp., 5 F. R. D. 388 (D. C. D. Minn., 1946).

Thus, Local Rule 56(g)(4) provides:

"When so ordered by the court or agreed to by stipulation of the parties, the fees of the reporter for taking down testimony and proceedings in court or before a Master or Examiner and for taking down arguments or other matters and for transcribing testimony or proceedings before the court or before a

Master or Examiner and for transcribing arguments or any other matter shall be taxed as costs" (emphasis added). [Tr. Vol. III, p. 556.]

As appears from the affidavits of Stuart L. Kadison, Charles Horowitz and C. Robert Ogden [Tr. Vol. II, pp. 473, 485-486, 489-490] the transcript of the trial proceedings in the instant case was neither ordered by the Court nor agreed to by stipulation of the parties. Rather, a daily transcript was made at the request of General Motors, and portions of it were ordered and paid for by Anderson. Where Anderson ordered and paid for transcript it was charged with 50% of the cost of the original.

Absent, an order of the Court or stipulation relative to the transcript costs, the claimed item of cost was not taxable under the pertinent Local Rule. Accordingly, the Clerk, in taxing costs, refused to allow this item, explaining:

"Neither counsel contend that there was a stipulation regarding the reporter's fees.

"The words 'order of the Court' are simple and suggest a written order or direction, signed by the judge and filed in the case, or an oral order of the judge which is entered on the minutes or is a part of the reporter's transcript of the proceedings in the cause. Such an order or definite formal direction by the Court should be in the presence of all parties, each of whom thereby has an opportunity to be heard and register his consent or objection thereto. This local Rule was adopted by the judges of this District in 1941 and remains unchanged. Counsel are charged with knowledge thereof and the necessity of complying therewith if they seek to benefit therefrom. They cannot now complain because of their own dereliction.

> Absent such an order or stipulation, the item on the Cost Bill entitled 'Court Reporter's Fees' is disallowed" [Tr. Vol. II, p. 496].

Nevertheless, the Court below, on General Motors' Motion to Retax Costs, permitted General Motors to recover the cost of the reporter's transcript making a purported *nunc pro tunc* order [Tr. Vol. II, p. 527], In so doing, the Court disregarded the mandate of local Rule 56(f), which provides, in pertinent part, as follows:

> "The motion (to retax costs) will be heard on the same papers and evidence used before the Clerk" [Tr. Vol. II, p. 555].

The trial court's error in this regard should be rectified by this Court.

Conclusion.

Although, as heretofore pointed out, the trial court committed other errors as well, the gravamen of Anderson's claim against General Motors is that General Motors is guilty of fraud by virtue of its non-disclosure to Anderson of General Motors' policy of terminating distributorships, including that of Anderson, whenever it became more profitable to do so. Not only did responsible General Motors' officials stand silently by while Anderson invested substantial sums in his distributorship, but, in fact, they encouraged him to make such expenditures and assured him that he had no need to fear a termination of his distributorship as long as he performed satisfactorily. It was conceded at the trial that Anderson's performance was satisfactory to General Motors, yet General Motors nevertheless terminated the Anderson distributorship in 1953 in accordance with its secret policy, adopted many years before, of which Anderson was justifiably ignorant.

The existence of General Motors' Distributorship Termination Policy and its non-disclosure to Anderson were established to the jury's satisfaction by an overwhelming array of evidence, so that the only remaining issue was *whether General Motors was, as a matter of law, under a duty to disclose its Distributorship Termination Policy to Anderson.*

In light of the complete domination and control which General Motors exercised over Anderson; the closeness and fiduciary nature of their relationship and the resulting trust and confidence which Anderson reposed in his General Motors superiors; the fact that Anderson had no means of learning of General Motors' policy unless it were disclosed to him by his General Motors' superiors; the importance of the policy to Anderson and the disastrous consequences to Anderson which its non-disclosure was certain to bring; we submit that General Motors was, as a matter of law, under a duty to disclose its Distributorship Termination Policy to Anderson. The Court below erred in refusing to so hold, and accordingly the judgment below must be reversed.

Respectfully submitted,

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APPENDIX A

Congressional Findings Re General Motors' Domination and Control of Its Distributors and Dealers.

1. House Report No. 2850, 84th Congress, Second Session (1956), U. S. Code Cong. and Admin. News (pp. 4596-4609) contains the following findings:

"Concentration of economic power in the automobile manufacturing industry of the United States has developed to the point where legislation is required to remedy the manifest disparity in the ability of franchised dealers of automotive vehicles to bargain with their manufacturers. Investigations of the automobile industry, moreover, demonstrate a continuing trend toward greater concentration, as well as abuse by the manufacturers of their dominant position with respect to their dealers. These investigations have disclosed practices and conditions which require new legislative methods and a change in established concepts. The bill as amended proceeds from the conclusion that in the automobile industry concentration of economic power has increased to the degree that traditional contractual concepts are no longer adequate to protect the automobile dealers under their franchises.

". . .

"Although automobile dealers are substantial business men in their local communities, in comparison with the automobile manufacturer, an individual dealer is a small-business man whose size makes it impossible for him to bargain effectively. In contrast with the economic power of each of the automobile manufacturers, the average dealer has an investment in the amount of $118,000. There are approximately 40,000 franchised automobile dealers in the United States. Roughly one-half, or 20,000, of these

dealers have contracts with General Motors, while 9,000 are franchised by Ford Motor Co.

"While the individual automobile dealer may be classified as a small-business man, collectively the automobile-dealer group is of great importance to the economy. Franchised automobile dealers have a total investment in their businesses in the amount of more than $5 billion and employ approximately 668,000 persons.

"Extensive testimony was adduced by the committee at the hearings on this bill with respect to both the contractual relationship between automobile manufacturers and their dealers, and marketing practices current in the automobile industry. Distributive conditions condemned by the Federal Trade Commission in its report on the motor-vehicle industry, issued in 1939, have continued up to the present time, according to investigations made by the Subcommittee on Automobile Marketing Practices of the Senate Committee on Interstate and Foreign Commerce and by the Sub-committee on Antitrust and Monopoly of the Senate Committee on the Judiciary.

"In 1939, the Federal Trade Commission after an extensive investigation of automobile marketing practices stated:

"The Commission finds that motor-vehicle manufacturers, and by reason of their great power, especially General Motors Corp., Chrysler Corp., and Ford Motor Co., have been, and still are, imposing on their respective dealers unfair and inequitable conditions of trade, by requiring such dealers to accept, and operate under, agreements that inadequately define the rights and obligations of the parties and are, moreover, objectionable in respect to defect of mutuality; that some dealers, in fact, report they have been subjected to rigid inspections of promises and ac-

counts, and to arbitrary requirements by their respective motor-vehicle manufacturers to accept for resale quantities of motor vehicles or other goods, deemed excessive by the dealer, or to make investments in operating plants or equipment without adequate guaranty as to term of agreement or even supply of merchandise; and that adequate provisions are not included for an equitable method of liquidation of such investments, sometimes made at the insistence of the respective motor-vehicle manufacturer.

"In connection with its study of the General Motors Corp., the staff of the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary reported on automobile distribution systems as follows:

"The franchise system for distribution of automobiles has been described as a system devised by the automobile manufacturers to secure maximum rights with a minimum of liability * * *. It may be defined as an agreement by which the manufacturer appoints the dealer to handle his line, and the dealer, in return for this privilege, agrees to conduct his business according to the standards and desires of the manufacturer. It is the method by which the manufacturer assures himself of control over the distribution of his product in what amounts to quasi-integration to the retail level of distribution. The manufacturer can maintain this control because of his superior economic position which he retains by threat of franchise termination." (pp. 4596-4598).

"In various suits in the past, General Motors has characterized its dealer franchise as follows:

"1. That it does not constitute a legal contract;

"2. That it lacks mutuality, and represents no legally enforceable obligation on the part of the seller to sell or on the part of the dealer to buy; 4598

"3. That it provides that the dealer shall perform to the satisfaction of the seller, and that the question of satisfaction is for the seller alone to determine;

"4. That no damages are recoverable by the dealer since loss of profits was not contemplated by the parties;

"5. That it is unenforceable and void because of indefiniteness, uncertainty, and lack of consideration;

"6. That, if valid, the agreement gives the factory the right to terminate at will.

"With few exceptions, the courts have sustained the manufacturer's interpretation of the agreement, and the courts have held that dealers fail to state a cause of action when suit is brought on the agreement alone.

"The hearings of the investigations conducted during this Congress in the Senate contain numerous instances of automobile manufacturers coercing and intimidating their franchise dealers. A primary source of the manufacturers' power over their dealers stems from the unilateral nature of the franchise agreements. (p. 4599)*

2. Bigness and Concentration of Economic Power—A Case Study of General Motors Corporation.

Staff Report of the Subcommittee on Antitrust and Monopoly of the U. S. Congress Senate Committee on the

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*On the basis of this report legislation was enacted which provides in part:

"An automobile dealer may bring suit against any automobile manufacturer engaged in commerce, in any district court of the United States in the district in which said manufacturer resides, or is found, or has an agent, without respect to the amount in controversy, and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer from and after August 8, 1956, to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer; . . . ." 15 U. S. C. Sec. 1222.

Judiciary, 84 Congress, First Session (1956) contains the following findings (pp. 76-81, 86-89):

". . . General Motors as the largest manufacturer in the United States deals with about 18,000 individual dealers handling its passenger cars and trucks. A relationship in which all the economic power rests with one party lends itself to inequities (p. 76).

". . .

". . . This contest for market preeminence between General Motors and Ford dramatized that the 'independence' of the dealer is more theoretical than real. Being completely dependent upon the factory, his position is more analogous to that of an employee.

". . .

". . . The heart of the matter appeared to be in the nature of the dealer franchise and the inequitable manner in which it permitted the manufacturer to control the dealer's economic life" (p. 77).

". . .

". . . The manufacturer felt the need to control the merchandising of his product, established standards of dealership operations, advertise and carry on market research. For these operations to be successful, direct association with the dealer was necessary and the wholesale distributor's function became a positive barrier to successful control over distribution.

"Displacement of the wholesaler began quite early, although for some firms he remained the major distribution conduit until the recent war. Today, however, he exists as an important factor anly in the case of low-volume car lines and in foreign operations. The manufacturer today generally deals directly with the retail dealer.

". . . Secondly, to each dealer each of the producers is an industrial giant. The wholesale distributor perhaps had economic power vis-a-vis the producer, but the individual dealer has little. . . ." (p. 78)

". . .

"The control exists because the dealer franchise does not represent the free will of the parties as do ordinary contracts. Professor Hewitt asserted that at any given time a majority of the dealers are already economically committed to one manufacturer, and thus have no practical choice but to accept any terms the manufacturer imposes By way of illustration, he pointed to General Motors' change from a continuing agreement to a 1-year agreement. The dealers objected to the change but had no choice in the matter because their investment committed them to one manufacturer (VII, 3203).

"Most critics of the factory-dealer franchise system agree that the faults of this system are directly attributable to the superior market position of the manufacturer. The economic strength of the manufacturer manifests itself in two principal ways:

> "(1) Control and supervision over the dealer's business.
>
> "(2) Power to terminate or to refuse to renew the dealer's franchise.

"Threat of termination which the manufacturer holds over the dealer, once the latter commits himself to the requirements for entry into the industry, permits the manufacturer to control the dealer and his operations. The

dealer accepts this relationship in the expectation that it will be profitable. He later can reconsider his decision only with the knowledge that his business is specialized in nature and his capital not readily transferable to alternative uses. The threat of termination, therefore, makes him a pliable tool.

"Criteria for the relationship between General Motors and its dealers are determined by the former. . . ." (p. 81)

". . .

"The manufacturer, using the threat of termination, has imposed controls upon the conduct of the individual dealership. These controls, explicitly detailed in the selling agreement, affect the capital the dealer shall supply, his building, his sales staff, and almost every phase of his operations. Violation of any of these provisions is cause for termination of the dealer franchise. Many of these provisions are discussed in the Subcommittee's hearings. They give the manufacturer a measure of control over the resale of his product which is unknown in other industries" (p. 86).

". . .

"Other dealers charged that upon various occasions they were requested by the factory to add new buildings, remodel, or completely renovate their premises. The threat of termination frequently left the dealer little option in the matter.

"The agreement requires the dealer to maintain a place of business satisfactory to the manufacturer, including

salesroom, service facilities, sales staff, and mechanical staff, and gives the manufacturer the right to inspect those facilities. . . ." (p. 87).

". . .

"The selling agreement contains a further control device over dealers in the form of a uniform accounting system prescribed by General Motors and the requirement of monthly financial reports, 10-day reports, and sales and service records. . . .

"These provisions provide the manufacturer with a complete picture of the operation and financial status of the dealer at all times, including his unit profits and trade-in allowances" (p. 88).

". . .

"The agreement provides for an advertising fund, which represents the assumption of additional managerial prerogatives by the manufacturer" (p. 89).